Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JOHN S. RENDALL, *Pro Se, Petitioner*
HERBERT M. CAMPBELL II, *Pro Se, Petitioner*

v.

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION (SEC), *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

FIRST
Has the United States Court of Appeals (10th Circuit) and the U.S. District Court violated a fundamental right of fairness when accepting and preparing "Amended Findings of Fact" (AFF) based on fabrication of evidence by the District Court?

SECOND.
Is it a miscarriage of justice for the Court of Appeals to accept tendered evidence by the District Court in its AFF, which was "clearly erroneous" as based on non-existent evidence of a video testimony? Fed. R. Civ. P. Rule 52 - Findings of Fact, … shall not be set aside unless clearly erroneous.

THIRD.
Is it a violation of a "Constitutional right of due process of law" for the Court of Appeals to affirm a District Court's AFF based on evidence not in the record? (The AFF was provided to the Court of Appeals pursuant to their order for evidence to support the original Findings of Fact of the District Court). The Constitution of the United States Amendment XIV.

FOURTH.
Does the absence of the record of all the exhibits (10 volumes numbered 500-1088) used in trial "void" the US Court of Appeals order and decision upholding the Amended Findings of Fact and Conclusions of Law of the lower court, which in turn, was prepared without the records of the exhibits?
Fed. R. App. P. 10(a) *See* United States v. Ross, 321 F.2d 61,65 No. 2 (2d Cir), *cert. denied*, 375 US 894 (1963)

II. PARTIES TO THE PROCEEDINGS

"Petitioners"

John S. Rendall, *Pro Se*
Herbert M. Campbell II, *Pro Se*

"Respondent"

The Securities and Exchange Commission

Solv-Ex Corporation

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IV. CITATIONS ENTERED IN THE CASE BY COURTS

A. Case 98 CV 00860
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B. Judgment - Defendants are permanently restrained and enjoined from violations of sections set out and that Rendall and Campbell pay civil penalties of $5,000 each to SEC dated **May 6, 2000.**

C. United States Court of Appeals for the Tenth Circuit, Case No. 00-2339, Order of Remand to District Court to clarify and identify evidence that filings with the SEC were false and misleading dated **August 4, 2003.**

D. In the United States District Court for the District of New Mexico - Amended Findings of Fact and Conclusions of Law dated **September 24, 2003**.

E. United States Court of Appeals for the Tenth Circuit, Case No. 00-2339, Order and Judgment affirming judgment of the District Court and denying Rendall's motion for the entire record of exhibits dated **April 15, 2004.**

F. United States Court of Appeals for the Tenth Circuit - Order denying petition for re-hearing and hearing en banc dated **June 16, 2004**.

V. STATEMENT OF JURISDICTION

A.
On April 15, 2004, the order and judgment of the United States Court of Appeals Tenth Circuit was filed in Case No. 00-2339 DC No. Civ-98-860-BB (D.N.M.) and is the subject of this Writ for review.

B.
On June 16, 2004 the order denying Appellant Rendall's petition for rehearing and rehearing *en banc* was filed in the United States Court of Appeals for the Tenth Circuit.

C.
The statutory provisions of the Rules of the Supreme Court of the United States, § 1253 and § 1254(1).

VI. STATUTORY PROVISIONS

A.

AMENDMENT XIV
(adopted 1868)

SECTION 1. All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

B.
Fed. R. Civ. P. Rule 1

Rule 1. Scope and Purpose of Rules

These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993).

1993 Amendments

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

C.
Fed. R. Civ. P. Rule 52

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in

granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

I. STATEMENT OF THE CASE

A. Background

The Securities and Exchange Commission (SEC) brought this enforcement action against Defendants Solv-Ex Corporation, its CEO John Rendall, and its senior vice-president and general counsel, Herbert M. Campbell II, for alleged violations of § 7(a) of the Securities Act of 1933 (Securities Act), § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that from January 1995 through April 1997, Defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC that created the misleading impression that each of the three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall

and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of them and permanently enjoined both men from future violations of § 17(a), § 10(b) and § 13(a). Now proceeding *pro se*, Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district to supplement its factual findings.[1]

B. Concise Statement Relevant to Questions

1. The court of appeals (10th Circuit) on review of the fully briefed appeal of John S. Rendall, *pro se*,[2] found:

> "Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." Roberts v. Metro. Life Ins. Co., 808 F.2d 1387, 1390-91 (10th Cir. 1987) (quotation omitted).

Here, although the district court made lengthy findings of fact, there are some important gaps that preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district

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[1] Exhibit A 1, pages 17, 18

[2] Exhibit A 1, page 23

court for further factual findings and explications of its reasoning, as we explain below.

2. The core issue to be addressed by the district court was bitumen extraction[3] and related to defendants representation of facts surrounding March 29, 1997 commencement of bitumen production,[4] stating:

> "If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7 and April 30, 1997, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a 'fact-specific inquiry' that 'depends on the significance the reasonable investor would place on the withheld or misrepresented information." Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988). Findings as to materiality are for the district court to make in the first instance."

3. The district court addressed the issue of "evidence" in its response to the 10th Circuit Court of Appeals (COA) on September 24, 2003. Exhibit A-2. The core issue of "bitumen extraction" findings of fact was now based on the non-existent video testimony of Dr. Jerry Fox.[5]

4. Defendant Rendall in his supplemental brief to the COA on October 20, 2003, Exhibit B-1, explained that

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[3] Exhibit A 1, page 19

[4] Exhibit A 1, pages 27, 28

[5] Exhibit A-2, paragraphs. 31, 34, 44, 48, 49, 50 , 54, 55, and 56

Dr. Jerry Fox's live testimony[6] concluded that the process works, Tr. 607,[7] and contradicts that filtration was part of the March 29, 1997 operation of bitumen extraction. Tr. 590.[8] There was no video testimony nor could there been as he (Dr. Fox) was a live witness.[9]

5. Rendall specifically drew the panel's attention to the question raised on the "core issue" of bitumen extraction in his supplementary brief on paragraphs 31, 34, 44, 48, and 50, pointing out that the evidentiary basis given by Judge Black was the non-existent video testimony of Dr. Jerry Fox.[10] It was deliberately fabricated evidence. In his Reply Brief, Exhibit B-2, Rendall reasserted that every finding is tainted in this fabrication of evidence (material error).[11] In light of these facts of fabrication of evidence, "the panel was deceived into accepting the biased District Judge's rulings."[12] The panel did not address the issue of "fabricated evidence" tainting the findings, nor the lack of specific response by the District Court to their August 4, 2003 order.[13]

6. Defendant Rendall requested that the entire record of exhibits be provided for the Court of Appeals[14] and

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[6] Exhibit B-1, page 114 ____
[7] Exhibit B-1, page 115
[8] Exhibit B-1, page 115
[9] Exhibit B-1, pages 113, 114
[10] Exhibit B-2, page 113
[11] Exhibit B-2, page 150
[12] Exhibit A-3, pages 88, 89
[13] Exhibit A-3, pages 88, 89
[14] Exhibit B-3, page 152

amended it to include certain specific exhibits.[15]

7. The Court of Appeals, by order dated April 15, 2004,[16] denied the request for the entire record of exhibits and allowed only specific exhibits.[17] The exhibits of the entire record are not in the possession of the Court of Appeals.

Subsequent Event

8. Defendant Rendall filed a Fed. R. Civ. P. Rule 60b(1)(2)(4)(6), and 28 U.S.C. § 144 motion in the District Court (DNM) in Civ. 98-00860 (BB) on August 19, 2004. However, in itself, this does not stay the finality of the Appeals Court (Tenth Circuit) decisions of April 15, 2004 and June 16, 2004.

C. JURISDICTIONAL STATEMENT

1. The SEC brought this action pursuant to authority conferred on it by Section 20(b) of the Securities Act [15 U.S.C. § 78u(e)] to restrain and enjoin the defendants from engaging in the acts, practices and courses of business described in this complaint and acts, practices and courses of business of similar purport and object. The SEC also sought relief in the form of an order requiring Defendants Rendall and Campbell to pay a civil penalty.

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[15] Exhibit B-4, page 155
[16] Exhibit A-3, page 86
[17] Exhibit A-3, page 90

2. The Court has jurisdiction in this action pursuant to Section 22(A) of the Securities Act [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the acts, practices and courses of business constituting the violations of law alleged occurred, and all of the defendants reside, within the District of New Mexico.

3. This matter came before the Court of Appeals on the *pro se* motions for extension of time to file opening briefs, submitted separately by Appellant, John S. Rendall and Appellant Herbert M. Campbell II. The motions are granted as provided herein. Appellants' opening briefs were to be filed on or before March 1, 2001. No further extensions of this deadline may be granted on the clerk's authority.

4. Pursuant to 28 U.S.C. § 1291 (1988 and Supp. 1992) and Civil Docket for Civil No. 98-860 BB/RLP:

> "Final Judgment of Permanent Injunction and Other Relief" entered on May 16, 2000, which incorporated by the "Court's Findings of Fact and Conclusions of Law" entered on March 31, 2000,

which disposes of all claims by and against all parties as per Fed. R. Civ. P. 54(b). This final order of the District Court was appealed.

5. The order and judgment of the Court of Appeals was filed in the United States Court of Appeals Tenth Circuit on April 15, 2004, No. 00-2339.

6. Rendall's petition for a re-hearing and suggestion for a hearing *en banc* was denied on June 16,

2004 by the Tenth Circuit of Appeals.

VIII. ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

A. The Rule of Law in the United States is based on evidence in the record. The primary finder of fact based on evidence in the District Court is the judge (or jury) (the trier of fact). The U.S. Supreme Court laid out explicitly what would be considered bias and prejudice by a judge as the "finder of fact."

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

United States v. Grinnel Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966). This issue was dealt with in Re International Business Machines Corp., 618 F.2d 923, 929 (1980) Second Circuit.

> As Mr. Justice Frankfurter noted in *Wilkerson v. McCarthy*, 336 U.S. 53, 65, 69 S.Ct. 413, 419, 93 L.Ed 407 (1949) (Frankfurter, J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

The Tenth Circuit Court of Appeals endorsed the District Courts "Amended Findings of Fact"[18] and affirmed its Conclusions of Law derived there from in its order of April 15, 2004.[19] Rendall explicitly pointed out that these Findings of Fact were tainted by "evidence not in the record"[20] (the non-existent video testimony of Dr. Jerry Fox who was a live witness at the trial). For the Judge to reach to an "extra judicial source" is bias and prejudice, which is intrinsically lawless, but in producing non-existent evidence in a court of law is fabrication of evidence, which this Court (the highest in the United States) must rule that:

> **"The Amended Findings of Fact by the U.S. District Court Judge Bruce B. Black has so far departed from the accepted and usual course of judicial proceedings and this was sanctioned by the Tenth Circuit Court of Appeals, which calls for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).**

B. Justice in the courts of law of the United States is governed by the Federal Civil Judicial Procedure and Rules authorized by the U.S. Congress. As stated succinctly in Rule 1:

> "They shall be construed and administered to secure the **just**, speedy and inexpensive determination of every action."

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[18] Exhibit A 3, page 89
[19] Exhibit A 3, page 89
[20] Exhibit B 2, page 150

The word "administered" was added in 1993 to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved, **not only fairly**, but also without undue cost or delay.

The case in point is Rule 52(a), which in part states:

> "Findings of fact, whether based on oral or documentary evidence, **shall not be set aside unless clearly erroneous** and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Case law has proliferated in defining "clearly erroneous" but for the trial court to reach to evidence not in the record (the non-existent video testimony of a witness whose live testimony is in the transcripts)[21] is "unjust and unfair" and a miscarriage of justice.

The Amended Findings of Fact of Judge Bruce B. Black,[22] and the Conclusions of Law derived therefrom, must be set aside as "clearly erroneous" and the injunction and fines imposed upon Defendants Rendall and Campbell[23] voided as a miscarriage of justice.

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[21] Exhibit B 1, pages 113, 114, 115
[22] Exhibit A 2, page 39
[23] Exhibit A 4, page 91

C. The U.S. Constitution Amendment XIV grants to Defendants John S. Rendall and Herbert M. Campbell II, citizens of the United States, "the due process of law" and equal protection of the law." The Tenth Circuit Court of Appeals endorsed the District Court's Amended Findings of Fact,[24] over the objections of Defendant Rendall[25] that they were tainted by the Judge's use of evidence, which was non-existent (Dr. Jerry Fox's non-existent video testimony quoted as evidence when he was a live witness according to the transcript in the record).[26] Since the Court of Appeals did not have this so-called evidence of a video,[27] it did not have any basis to accept such evidence without "due process." Rendall and Campbell have been deprived of the equal protection of the law in the affirmation of conclusions law based on unlawful findings without any "due process".[28] It is a case of the "blind leading the blind" and the decision is requested to be reversed.

D. The Tenth Circuit of the U.S. Court of Appeals ordered the clerk of the District Court (D.N.M) in this case, CV 98-00860, to provide them with the record of the case being appealed by Rendall, *pro se*.[29] The eight-day trial encompassed several witnesses with documentary exhibits (500-1088) being testified to in evidentiary examination. The District Court did not have the exhibits of the record,[30] and

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[24] Exhibit A 3, page 89
[25] Exhibit B 2, page 150
[26] Exhibit B 1, pages 113, 114, 115
[27] Exhibit A 3, page 90
[28] Exhibit B 1, page 135
[29] Exhibit B 3, page 152
[30] Exhibit B 4, pages 155, 156

Rendall requested that the SEC, as officers of the Court, provide the Court of Appeals the Exhibits.[31] Further, Defendant Rendall procured a few certified copies of exhibits from the SEC and requested their admission.[32]

The final order of the Tenth Circuit Court of Appeals on April 15, 2004,[33] as an afterthought, denied Rendall's motion for the SEC to supply the Court of Appeals the exhibits of the record. By their own order, the Tenth Circuit Court of Appeals could not rule on "Evidence as not being part of the record" (at the very least), here they did not have the record. Chicago v. Eastern Ill. R.R. Co. v. Southern Ry. Co., 261 F.2d 394 (7th Cir. 1958). But this issue is even more clear cut. The Tenth Circuit Court of Appeals had the transcripts of the eight-day trial and, even if they could not rule on the District Court facts based on Dr. Jerry Fox's supposed video testimony, they certainly knew or should have known that, as Dr J. Fox was a live witness, any video testimony (if such existed) was inadmissible in a court of law. The entire Amended Findings of Fact of the District Court is tainted[34] and must be reversed with the injunction and the fines against Rendall and Campbell voided.

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[31] Exhibit B 3, page 154
[32] Exhibit B 4, page 156
[33] Exhibit A 3, page 90
[34] Exhibit A 2, page 39

IX. APPENDIX

A. Orders, findings of fact and conclusions of law in conjunction with the judgment sought to be reversed.

1. Order of the Court of Appeals (Tenth Circuit) dated August 4, 2003 remanding to District Court for evidence of "false and misleading" 17-38

2. Amended Findings of Fact and Conclusions of Law of the District Court (D.N.M.) dated September 24, 2004..... 39-85

3. Order of the Court of Appeals (Tenth Circuit) dated April 15, 2004, affirming judgment of the District Court. 86-90

4. Judgment of District Court dated May 16, 2000. 91-96

5. Order of the Court of Appeals (10th Circuit) denying Rendall's petition for rehearing and hearing *en banc* dated June 16, 2004. 97-98

B. Material required to show when and how the Federal questions sought to be reviewed were raised in the Court of Appeals.

1. Appellant's Supplemental Brief dated October 20, 2003 on the District Court's Amended Findings of Fact and Conclusions of Law of September 24, 2004 100-136

2. Appellant's Reply Brief dated November 21, 2003..... 137-151

3. John S. Rendall's motion dated February 23, 2001 for the exhibits of the record be submitted by the Securities and Exchange Commission..... 152-154

4. John S. Rendall's amended motion for the exhibits of the record be submitted by the Securities and Exchange Commission 155-156

5. Appellant Rendall's petition for panel rehearing and suggestion for hearing *en banc* filed in the Tenth Circuit U.S. Court of Appeals on May 28, 2004 157-170

For the aforementioned reasons, John S. Rendall and Herbert M. Campbell II respectfully request that this Court grant a Writ of Certiorari.

Dated: September 9, 2004

Respectfully submitted,

John S. Rendall, *Pro Se*

Herbert M. Campbell, *Pro Se*

EXHIBITS A1-5

EXHIBIT A 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

No. 00-2339
(D.C. No. CIV-98-860-BB)
(D.N.M.)

ORDER
Filed August 4, 2003

Before **HENRY, PORFILIO** AND **MURPHY,**
Circuit Judges

The Securities and Exchange Commission (SEC) brought this enforcement action against defendants Solv-Ex

Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 17(a) of the Securities Act of 1933 (Securities Act), § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that, from January 1995 through April 1997, defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC, that created the misleading impression that each of three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV. Doc. 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall and Campbell made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of them and permanently enjoined both men from future violations of § 17(a), § 10(b), and § 13(a). Now proceeding *pro se*, Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district court to supplement its factual findings.

Factual Background

Rendall, an experienced chemical engineer, founded Solv-Ex in 1980 for the primary purpose of developing and implementing a new technology to process and recover

bitumen from oil sands.[1] Rendall was involved in all significant aspects of Solv-Ex's business. Campbell joined Solv-Ex in May 1992 after having worked in management positions for various mining companies. Campbell testified that to the extent there was a management team, he, Rendall, and John Butler were the people who ran things on a day-to-day basis at Solv-Ex. Among other things, Campbell "assumed primary responsibility for drafting press releases and reviewing public statements about [Solv Ex's] projects, and handling shareholder relations." Suppl. R. Vol. XIII, Doc. 120 at 4.

In the 1980's, Solv-Ex built a pilot plant and laboratory in Albuquerque, New Mexico, to further test and develop its new bitumen extraction process. A key component of this new process, which used hot water and steam rather than chemicals to separate the oil from the sand, was a piece of equipment known as the log washer. In 1988, Solv-ex acquired 100% of the working interest in a lease in the Athabasca oil sands of Alberta, Canada, known as Lease 5. After preparing a feasibility study and acquiring financing, Solv-Ex began construction of a plant on Lease 5 that would use the new bitumen extraction process. This new process for bitumen extraction was one of the three technologies about which the SEC contended defendants made materially false and misleading statements or material omissions

Although Solv-Ex's core technology was bitumen extraction, it also developed technologies to extract minerals from the clay sands as a by-produce of bitumen production. The primary mineral of interest to Solv-Ex was aluminum oxide, or alumina, which is used in electrolytic cells for the

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[1] Bitumen is a heavy oil with the consistency of tar.

production of metallic aluminum. Solv-Ex believed it could produce a unique kind of alumina that could remain in solution within the cell at much lower temperatures than alumina currently available on the market. Solv-Ex also worked on designing and constructing a new kind of electrolytic cell that would use this new alumina. This new electrolytic cell was the second technology about which the SEC alleged defendants made materially false or misleading statements or material omissions.

In producing alumina from the clay fines, Solv-Ex discovered a synthetic mineral that exhibited some qualities of brightness similar to that of titanium dioxide (Ti02), a naturally occurring mineral used as a high-end pigment in many industrial applications. Solv-Ex named its synthetic mineral "Ti02S," which stood for "Titanium dioxide substitute," and explored uses for this synthetic pigment in the paint, plastics, and paper industries. The development of Ti02S was the third technology about which the SEC alleged defendants made materially false or misleading statements or material omissions.

Elements of the Alleged Securities Fraud

Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and § 17(a) of the Securities Act (15 U.S.C. § 77q(a)) are general fraud provisions. Together with Rule 10b-5 (17 C.F.R. § 240.10b-5), they make it unlawful for a person or entity, in connection with the purchase or sale of a security, to employ any device, scheme, or artifice to defraud, to make an untrue statement of material fact, or to omit material fact that is necessary to make the statements made, in the light of the circumstances under which it was made, not misleading. Section 13(a) of the Exchange Act (15 U.S.C. § 78m(a)) requires the issuer of a security to file annual and quarterly reports with the SEC, and Rule 12b-20 (17 C.F.R. § 240.12b-

20) provides that required filings with the SEC must include "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made[,] not misleading."

Both the Securities Act and the Exchange Act expressly authorize the SEC to bring a civil enforcement action seeking injunctive relief whenever it appears that a person is engaged, or is about to be engaged, in activities that violate the respective Acts or the rules promulgated thereunder. 15 U.S.C. § 77t(b) (Securities Act); *id.* § 78u(d)(1) (Exchange Act). Both Acts also authorize the SEC to seek monetary penalties for violations of the respective Acts or the rules promulgated thereunder. *Id.* § 77t(d)(1) (Securities Act); *id.* § 78u(d)(3)(A) (Exchange Act).

Because the SEC is statutorily authorized to bring an enforcement action, it does not have to prove those elements that a private person must prove to establish his standing to bring an action. In particular, the SEC does not have to prove that any investor either relied upon or was injured by the material misstatement or omission. *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4, 1364 (9th Cir. 1993) (action under § 10(b) and Rule 10b-5); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (same); *Kramas v. Sec. Gas & Oil Inc.*, 672 F.2d 766, 770 (9th Cir. 1982) (private action under § 17(a)).

The SEC does, however, have to prove those elements that establish the wrongful conduct and, thus, the securities law violation. To establish a violation of § 10(b) and Rule 10b-5, the SEC must prove that each defendant: "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Monarch Funding*

Corp., 192 F.3d 295, 308 (2d Cir. 1999). "Essentially the same elements are required under Section 17(a)(1)-(3) in connection with the offer or sale of a security, though no showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3)."[2] *Id. (citing, inter alia, Aaron v. SEC*, 446 U.S. 680, 701-02 (1980)). The SEC need not prove scienter in a civil enforcement action under § 13(a) for filing false or misleading reports with the SEC. *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998). It need only establish that the defendant filed a required report with the SEC that contained information that was materially false or misleading or omitted material facts.

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[2] Section 17(a) provides as follows:

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in Section 206B of the Gramm-Leach-Bliley Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly.

(1) to employ any device, scheme or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material face necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Requirements of Fed. R. Civ. P. Rule 52(a)

In actions tried on the facts without a jury, Fed. R. Civ. P. 52(a) requires the trial court to "find the facts specially and state separately its conclusions of law thereon." "[T]he touchstone for whether findings of fact satisfy Rule 52(a) is whether they are sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts so as to facilitate a meaningful review of the issues presented." *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Servs.*, 69 F.3d 1081, 1087 (10th Cir. 1995) (quotations omitted). "Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." *Roberts v. Metro. Life Ins. Co.*, 808 F.2d 1387, 1390-91 (10th Cir. 1987) (quotation omitted). Here, although the district court made lengthy findings of fact, there are some important gaps the preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district court for further factual findings and explications of its reasoning, as we explain below.

Materially False or Misleading Statements and/or Omissions in Public Statements other than SEC Filings

1. Which Public Iterations Were Actionable?

The district court found that Rendall and Campbell made numerous false or misleading statements and that at least three of them were material. These three material misrepresentations relate to each of the three technologies, respectively. They are as follows: 1) "that commercial-scale production of bitumen oil had begun on March 29 at the Solv-Ex plant in Alberta, Canada;" 2) "that the testing of a

purportedly revolutionary 2700 ampere electrolytic cell used for the production of metallic aluminum had been 'successful' and was therefore going to be scaled up;" and 3) "that an industrial mineral created from the by-produce of Solv-Ex's bitumen extraction technology, Ti02S, had been shown to be suitable for certain applications in the paint and plastics industries. Statements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic." R. Suppl. Vol. XIII, Doc. 120 at 36.

In setting out these three material misrepresentations, the district court did not specify when and by whom each of these misrepresentations was made.[3] We will assume, however, that the court intended to include at least those iterations of the misrepresentations to which it referred in its subsidiary findings. Those findings refer to three public iterations of the first material misrepresentation, relating to bitumen production: A March 31, 1997 press release; and April 7, 1997 conference call; and an April 30, 1997 press release.

The subsidiary findings refer to six public iterations of the second material misrepresentation, relating to the electrolytic cell: a February 26, 1996 press release; a March 11, 1996 press release; an August 26, 1996 letter to

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[3] The identity of the speaker is obviously relevant for liability purposes. The timing of the statement may also be relevant because liability depends on what the speaker knew at the time he made the statement. Thus, a statement that may not have been actionable when first made, in light of what the speaker knew at the time, may become actionable on subsequent repetition if new facts have since come to light that reveal the false or misleading nature of the statement to the speaker.

shareholders; a September 5, 1996 conference call; a September 10, 1996 press release; and a December 3, 1996 conference call. The subsidiary findings do not mention the first and most complete iteration of this representation: the January 23, 1996 press release that was issued shortly after the test of the 2700 ampere cell. It is unclear whether the district court merely overlooked this press release in its findings, or whether it purposely omitted mention of the press release due, perhaps, to its timing or some other fact. On remand, the district court should clarify whether it intended to include the January 23, 1996 press release among the public statements it found to be materially false or misleading.

When we come to the third material misrepresentation the district court found defendants made, we run into further difficulties. This third misrepresentation is composed of two parts the first of which poses no problem. The district court found that defendants misrepresented that "an industrial mineral created from the by-product of Solv-Ex's bitumen extraction technology, Ti02S, had been shown to be suitable for certain applications in the paint and plastics industries." *Id.* The subsidiary findings refer to two public statements that contain representations as to Ti02S's suitability for applications in the paint and plastics industries: a September 5, 1996 conference call; and a September 6, 1996 press release.

The second part of the misrepresentation is not so straightforward The district court found that "[s]tatements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic." *Id.* This finding is extremely vague, especially in light of the record evidence and the district court's subsidiary findings. The record reveals many different statements by one defendant or the other about Ti02S's potential as it relates to the paper

industry. Likewise, the district court made numerous subsidiary findings about Ti02S as it relates to the paper industry. Some of these findings concern statements about the production of TI-2S, some concern statements about past test results, and some concern statements about future testing. Only one subsidiary finding concerns a statement about Ti02S's potential *use* in the paper industry. That statement was made in a September 6, 1996 press release, which said that "independent testing to date" showed Ti02S appears quite suitable for the huge filler markets in paper." *Id.* at 21. The district court's use of the plural "statements" in its finding that "[s]tatements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic," however, suggests that it had more in mind than this single statement. Perhaps the court was referring to statements about potential production and/or testing of TI02S, as well. From our review of the court's decision, however, we cannot accurately ascertain which other statements about Ti02S the district court found to be actionable. On remand, the district court should identify which statements by Campbell and/or Rendall about Ti02S's potential as it relates to the paper industry, the court found to be materially false or misleading.

2. What was false about the statement and/or what material facts were omitted that should have been included to make the statements not misleading?

The district court's ultimate findings of material misrepresentation also do not identify exactly what was false or misleading about defendants' statements, including what material facts should have been disclosed to make the statements not misleading. While the district court's subsidiary findings include numerous facts that our review shows were not revealed in defendants' public statements, the court made no findings as to which of those omitted facts

were material.

For instance, with regard to defendants' representations that commercial-scale production of bitumen had begun at the Alberta plant on March 29, the district court made the following subsidiary findings: 1) during the March 29 run of the log washer circuit, installation of the automatic instrumentation had not been completed; 2) Solv-Ex personnel determined that modifications in the water circulation and clarification circuit would be necessary to achieve continuous operation; 3) the log washer had to be shut down after only twelve hours due to an unexpected build-up of solids in the pump box; 4) Solv-Ex was not able to filter bitumen successfully at the Lease 5 plant until April 21, 1997, at which time it produced only two 55-gallon drums; 5) Solv-Ex was not able to duplicate the production of filtered bitumen thereafter; 6) only after two or three cycles of operation, the log washer circuit again developed operational problems on April 21 and had to be shut down; 7) in fact, after the log washer was shut down initially on March 29, it was not operated thereafter except for isolated test and demonstration runs of no more than six hours; and 8) Solv-Ex was never able to sustain continuous operation of the log washer at the Alberta plant.

If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7, and April 30, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). Findings as to materiality are for the district court to make in the first instance.

We face the same problem with regard to the other two representations the district court found to be materially misleading. Even if we could determine what facts recited by the district court are missing from the relevant public statements about the cell and about Ti02S,[4] we cannot determine which of those facts the court found to be material. On remand, the district court should make additional findings as to what was false or misleading about the relevant statements by defendants, including what material facts were omitted, if any.

Scienter

Additional findings by the district court as to what material facts defendants failed to disclose are also essential to our review of the issue of scienter with respect to the claims under § 10(b) and § 17(a)(1). Scienter is a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976) The scienter element may be satisfied by conduct that is reckless, which we have defined in the securities fraud context as "conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996) (quotation omitted).

"Courts have been cautious about imposing liability for securities fraud based on reckless conduct, however."

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[4] And as previously discussed, we cannot even be sure which public statements about those two technologies the district court found to be actionable.

City of Phila. v. Fleming Cos., Inc., 264 F.3d 1245, 1260 (10th Cir. 2001). A finding of scienter cannot be based on "fraud by hindsight, for example, because corporate officials should be liable for failing to reveal only those material facts reasonably available to them." *Id.* (quotations omitted). Also, that a defendant knew facts that the court later determines "to have been material, without more, is not sufficient to demonstrate that the defendant intentionally withheld those facts from, or recklessly disregarded the importance of those facts to, a company's shareholders in order to deceive, manipulate, or defraud." *Id.*

We have held that , "to establish scienter in a securities fraud case alleging non-disclosure of potentially material facts, the plaintiff must demonstrate: (1) the defendant knew of the potentially material fact, and (2) the defendant knew that failure to reveal the potentially material fact would likely mislead investors." *Id.* at 1261. Recklessness may satisfy the knowledge requirement under this scenario if the defendant has "knowledge of a fact that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *Id.*

The district court's findings touch very little on either Rendall's or Campbell's state of mind. The court did find that "Solv-Ex, Rendall and Campbell knew, or were reckless in not knowing, several of the material statements they issued were false and misleading[,]" but the court did not specify the statements to which it referred. R. Suppl. Vol. XIII, Doc. 120 at 38. The court's subsidiary findings do not otherwise provide us a clear understanding of the factual basis for the court's ruling as to scienter. Although the court did make specific findings as to one or the other defendant's knowledge of a few facts, it did not make similar findings as to many other facts. We cannot effectively review the

question of scienter without knowing which material facts the district court determined each defendant knew. For example, Campbell testified that he did not have actual knowledge of a host of facts on which the SEC relied in arguing that his statements were materially false or misleading. The district court 's decision does not reveal whether the court disbelieved this testimony, or whether the court believed it, but nonetheless imputed knowledge of certain facts to Campbell.

Further, Campbell contended that he consulted with Rendall and other scientists before drafting any public statement and that he had no duty to look behind their representations and read the technical reports himself. The district court's decision suggests that it concluded that Campbell did have a duty to read the technical reports. *See id.* at 37 (stating that Campbell "had access to all of the negative tests and consultants' caveats which he chose to largely ignore in drafting the press releases"). If the court did impose such a duty on Campbell, the scope of that duty is not apparent from the court's decision.

For instance, the court may have concluded that Campbell had an absolute duty to ascertain the facts firsthand by reading the technical reports before he drafted any public statement about the technologies. Or, the court may have concluded that while Campbell ordinarily could have relied on the technical information he received from conversations with Rendall and others, he knew certain facts that made that reliance unreasonable and triggered a duty to independently verify the information by reading the reports himself. We express no opinion as to whether either of these theories would be factually or legally supportable. We mention them only to illustrate that we have no clear understanding of the basis for the court's ruling as to scienter.

On remand, the district court should make additional findings addressing what each defendant knew. If the court did impute knowledge of any facts to either defendant, it should explain the legal and factual basis for that imputation.

Materially False or Misleading Statements or Omissions in SEC Filings

The district found that "Solv-Ex filed materially false reports with the Commission, and filed reports with the Commission that, in addition to the information expressly required to be included in the report, failed to include such further material information as was necessary to make the required statements, in the light of the circumstances under which they were made, not misleading." *Id.* at 39. The district court did not, however, identify the filings to which it was referring. Looking elsewhere in the district court's decision, we find a reference to the Form 10-K for FY1995 and a reference to the Form 10-K and amended Form 10-K for FY1996. The Court recited certain disclosures in the FY1995 Form 10-K, but did not state that those disclosures were false or misleading in any way. *Id.* at 29. The court found that the FY1996 Form 10-K and amended Form 10-K "contained misleading statements regarding the status of Solv-Ex's aluminum reduction cell testing and technology." but it did not specify which of the statements about the cell and its technology in either of those filings were misleading. *Id.* at 32.

To effectively review the propriety of the court's finding that Solv-Ex filed periodic reports with the SEC that were materially false and omitted material facts necessary to make them not misleading, we must be able to ascertain which filings and which statements within those filings the district court found to be materially false or misleading. And we must be able to ascertain what facts that were omitted

from those statements the district court found to be material. At present, we cannot ascertain any of that information absent additional findings by the district court.

Issues Not Affected by the Need for More Findings

Although most of the issues raised by Rendall and Campbell on appeal require more findings from the district court for their resolution, a few do not. In particular, we do not need additional findings in order to decide whether the SEC was required to prove either that investors relied on defendants' statements or that those statements caused the fluctuations in stock price that led to investor injury. As our earlier recitation of the elements of the SEC's claims reveals, the SEC did not have to prove either that any investor relied on defendants' statements or that any investor was injured by those statements. That the SEC may have argued either reliance or causation as part of its case does not alter its ultimate legal burden.

Nor do we need additional findings to determine whether the district court abused its discretion in excluding certain evidence defendants claim was relevant to the materiality of their statements, to investor reliance, and to causation. We review the district court's evidentiary rulings under an abuse of discretion standard, "considering the whole record and reversing only if there is a firm and definite belief the trial court made a clear error in judgment." *United States v. Marshall*, 307 F.3d 1267, 1269 (10th Cir. 2002).

One of the defendants' theories at trial was that during the relevant period, a group of short-sellers were trying to manipulate the price of Solv-Ex stock for their own gain by, among other things, launching a barrage of negative publicity about Solv-Ex and its technologies. Defendants argued that the evidence would show the short-sellers were

successful in driving the market, while defendants' own public statements had no effect. Defendants contended that because their public statements had no effect on the price of Solv-Ex stock, those statements could not have been either material to any investor or the cause of any investor loss.

To support their theory, defendants attempted to introduce testimony showing that the price of Solv-Ex stock did not always go up in reaction to positive public statements by defendants; in fact, the price sometimes went down despite defendants' positive public statements, due to the actions of short-sellers. The SEC objected to both Rendall's and Campbell's testimony on this matter. The district court sustained the SEC's objections, but did permit counsel to make an offer of proof.

Defendants made the following offer of proof:

> The tender would be that I'll have Mr. Campbell discuss what happened to the price in February and March, 1996; their various press releases - I was going to show him some that relate to the repeated disclosure of the aluminum cell test. One on February the 23, and a second one on March 21. And the price - with respect to the February 21, the price of that date declined substantially. March 21, it went up a minor amount, less than a point. And then along came this negative publicity he just mentioned from the Wall Street Journal, Barron's Dan Dorfman, just back to back, three days in a row, right after the most positive announcement the company ever made, and the stock declined 70 percent; from 21 to 7, which we think shows there are other influences in the market, and it's certainly not Solv-Ex's public statements that are driving the price of the stock upward. That's the tender.

Id. at 1283. Although counsel did not explicitly include any exhibits in his tender, it is apparent from a discussion at the conclusion of the trial both that counsel intended to tender to include exhibits and that the court understood them to be included. *See* R. Suppl. Vol. VI at 1570-71. We assume the exhibits intended to be tendered included Exhibits 865-1049.

On appeal, both defendants argue that the court erred in excluding the tendered evidence. They contend that the excluded evidence was part of the total mix of information available to investors, so the district court should have considered it in making its assessment of materiality. They further contend that had the court considered the excluded evidence, that evidence would have established that none of defendants' statements were material.

As we noted earlier, materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information," *Basic Inc.*, 485 U.S. at 240. "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [act]." *Id.* at 231 (quotation omitted). In other words, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.* at 231-32 (quotations omitted).

The negative publicity about Solv-Ex was part of the total mix of information available to investors and, to that extent, was relevant to the issue of materiality. The excluded evidence was not the only evidence of negative publicity before the court, however, and the court indicated that it was well aware and that there was substantial negative publicity

about Solv-Ex during the relevant period. To the extent the excluded evidence related to other activities of short-sellers or to fluctuations in the price of Solv-Ex stock, it had little if any relevance to the issue of materiality. Even if relevant, however, none of the excluded evidence established what defendants argue: that none of their own public statements were material.

First, even if the market did not reflect a direct correlation between the issuance of positive public statements by defendants and the price of Solv-Ex stock, that does not mean that defendants' statements were immaterial. Their positive public statements may well have buffered what otherwise would have been a greater drop in the stock price. Moreover, even if investors were aware of negative publicity about Solv-Ex from third-party sources, that does not mean that defendants' own statements were not material. "Ordinarily, omissions by corporate insiders are not rendered immaterial by the fact that the omitted facts are otherwise available to the public." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1114 (9th Cir. 1989).

There is a significant difference between information provided by third parties and information provided by corporate insiders, especially as regards the status of research and development of new technologies. *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091 (1991) ("Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources....").
Campbell himself acknowledged this difference when, in response to a question whether negative publicity about Solv-Ex's technology caused him to question that technology, he testified that it did not because the reports were made by people who had not talked to Solv-Ex or seen the technology firsthand. "[H]ow could they know what they are talking about? They've never seen the technology. They didn't even

know what it was. You say that should make me suspicious. I hardly think so." R. Suppl. Vol. IV at 1115.

The three groups of defendants' statements that the district court found to be materially false or misleading all related to matters that a reasonable investor would expect a corporate insider to have considerably more knowledge of than any third party. Thus, the inclusion of negative statements from third parties in the general mix of information about Solv-Ex did not negate the materiality of defendants' own statements. *Cf. In re Apple Computer Sec. Litig.*, 886 F.2d at 1114 (holding that under fraud on the market theory, the facts omitted by corporate insider must be "transmitted to the market with roughly equal intensity and credibility, [for] the market [to] receive complete and accurate information").

Because other evidence of negative publicity about Solv-Ex was introduced at trial, and because the excluded evidence did not negate the materiality of the statements the district court found to be false and misleading, we conclude that the district court did not abuse its discretion in excluding the tendered evidence on the issue of materiality. Nor did the court abuse its discretion in excluding the evidence to the extent it was relevant to either investor reliance or causation. As we held earlier, neither of those matters were properly at issue in this SEC enforcement action.[5]

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[5] Rendall also makes a related argument on appeal that the magistrate judge erred in striking several of defendants' affirmative defenses that were based on the actions of third parties in the market. The record does not reflect that defendants ever sought reconsideration of that order before the district court. "[A]ppellate courts are without power to hear appeals directly from orders of federal magistrates." *Pippinger v. Rubin*, 129 F.3d 519, 533 (10th

Conclusion

The remaining issues that Rendall and Campbell raise on appeal are affected by our need for additional findings from the district court. Therefore, we will not address them at this time. Instead, we will remand to the district court for the limited purpose of making additional findings of fact, and conclusions of law where necessary, in accordance with our discussion above and with the following directive.

On remand, the district court should 1) clarify whether it intended to include the January 23, 1996 press release among the public statements it found to be materially false or misleading; 2) identify what statements Rendall and/or Campbell made about Ti02S's potential for use in the paper industry that were materially false or misleading; 3) identify what material facts were omitted from the three statements set forth in Conclusions of Law ¶ 11 of the Court's Findings of Fact and Conclusions of Law that should have been included so as not to make the statements misleading; 4) identify what material facts that were omitted or falsely stated that Rendall knew or what material facts that were omitted or falsely stated that Campbell knew; 5) clarify whether the court imputed knowledge of any material fact to

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(Continued)
Cir. 1997) the magistrate judge's order, "we may not consider the issues decided in that order on appeal." *Id.* at 534.

either Rendall or Campbell and, if so, the factual and legal basis for that imputation; and 6) identify what filings with the SEC and which statements within those filings were materially false or misleading, and identify what material facts were omitted from those statements that should have been included to make the statements not misleading.

This court will retain jurisdiction of this appeal pending the district court's further rulings, which shall be certified to this court as a supplemental record.

IT IS SO ORDERED.

Entered for the Court
PATRICK FISHER, Clerk

By: s/Karen Phillips
Deputy Clerk

EXHIBIT A 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

No. CIV 98-860 BB

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

COURT'S AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for a trial to the Court without a jury on December 20, 21, 22 and 23, 1999, and February 24, 25, 28, and 29, 2000, and all evidence having been presented, having considered the parties' proposed findings and conclusions, and having reviewed the relevant law, the Court now files its amended findings of fact and conclusions of law:

Findings of Fact

History and Background of the Defendants

1. Solv-Ex, a New Mexico corporation, was formed in 1980 to engage in research and development of improving, as well as developing, technology to process and recover bitumen (heavy, low specific gravity crude oil) from oil sands. Ex. 863, pp. 1, 42. Solv-Ex publicly raised several million dollars through an initial public offering and private offerings to engage in such research and development activities.

2. John Rendall was the principal founder of Solv-Ex. Since its inception, Mr. Rendall has been Solv-Ex's Chairman, CEO, and larges individual shareholder. As Solv-Ex's Chairman and CEO, Mr. Rendall has been involved in all significant matters involving the Company.

3. Prior to incorporating Solv-Ex, Mr. Rendall's professional career for the period 1959 through 1979 involved designing, commissioning, operating and managing more than ten chemical, petrochemical and industrial plants in England. Mr. Rendall joint-ventured a company he started with Rio Tinto Zinc ("RTZ") to market his extractive processes, including technology to make oil from oil sands. The Athabasca sand in the northern region of Alberta, Canada, contains bitumen. In connection with the RTZ joint venture, Mr. Rendall established a process that extracted oil from the Athabasca tar sands and assisted in the construction of a pilot plant to test that process located near Fort McMurray, Alberta, Canada, in 1976. The process involved the use of

solvents in extracting oil from tar sands. IN 1979, Mr. Rendall discovered that a commonly available piece of equipment, known as a logwasher, had the capacity to separate oil from the crushed rocks, sand, water and fine clay residue and he patented that process.

4. In the 1980's, Solv-Ex built a pilot plant and laboratory in Albuquerque, New Mexico to further develop, test and improve upon the process for extracting oil from bitumen. At the time, the process was a solvent assisted hot water process intended to provide high bitumen recovery rates for a wide range of ore grades, while producing waste tailings which were more environmentally acceptable.

5. In 1988, Solv-Ex acquired 100% of the working interest in the Bitumount lease in Alberta, Canada, known as "Lease 5" which covered 5,874 acres. On January 6, 1989, Drs. George S. Pemberton and Michael S. Ranger, Professors of Geology at the University of Alberta, issued a report entitled "Geology of the Solv-Ex Corporation Athabasca Oil Sands Lease Including Bitumen and Titanium Reserve," which estimated reserves at 1.127 billion barrels of bitumen.

6. In May 1992, Herbert Campbell joined Solv-Ex as senior vice president and general counsel. Prior to joining Solv-Ex, Mr. Campbell had worked in various management positions for mining companies, including the raising of venture capital. Since NASDAQ had threatened to suspend the listing for Solv-Ex, one of his first duties was to satisfy the demands of that stock exchange. His other duties included preparation of a business plan to assist in

raising working capital for Solv-Ex, negotiating and preparing an agreement with the Alberta Oil Sands Technical Research Authority to fund pilot plant testing of bitumen tailings, and engaging in efforts to raise capital to build a minerals processing plant. Later, Mr. Campbell's duties covered negotiating and preparing the acquisition of another oil sands lease in the Athabasca region, negotiating and preparing agreements with outside consultants who assisted Solv-Ex in the evaluation and development of its processes, and raising capital to build oil extraction and minerals production facilities. Mr. Campbell also assumed primary responsibility for drafting press releases and reviewing public statements about those projects. He also had those statements disseminated to the business community through the Business Wire. He also drafted portions of the Company's periodic reports between 1995-1997 and handled shareholder relations as well as performed the duties of Corporate Secretary and General Counsel.

7. There are three generally accepted steps in the evolution of taking an idea from the drawing board to producing a product or improving upon a process to achieve commercial production. First, the initial discovery, testing and development of the process or product is done under controlled laboratory conditions or "bench scale" testing. Second, the product or process should be tested and proven in an intermediate step, usually, a pilot plant or prototype model, that is larger and more elaborate than the laboratory, but not fully up to scale of a commercial application. Third, the process or product must be proven in a commercial plant. The likelihood of a financially viable project cannot be reliably predicted

until the process reaches this third stage. Solv-Ex operated its bitumen extraction technology only at the laboratory and pilot plant scale from February 1995 through December 1996. The electrolytic cell and Ti02 products never proved successful beyond the scale or bench level. From 1995 to 1997, however, Solv-Ex press releases, shareholder letters, and SEC filings created the impression each of these processes was moving forward with great success.

Bitumen Production

8. In a conference call held on May 18, 1995, Mr. Rendall indicated that a marketing contract for the oil is at hand and should be announced before "we get into financing." Ex. 769, pp. 6, 8.

9. In May 1995, Mr. Rendall also signed a glowingly optimistic letter to shareholders indicating Lease 5 was "estimated to contain one billion barrels of oil" and "the project to produce synthetic minerals, including alumina, from the Suncor tailings ponds, could be in production by the end of the year." Rendall also represented, "we have nearly completed our electrolytic test cell for production of aluminum metal and expect to have it operational in the near future." Ex. 766. Since the scale level cell had not even been tested, much less the prototype, it was highly optimistic to postulate it could be operational "in the near future."

10. In Jun 1995, Solv-Ex signed a letter of intent with Gibson Petroleum Company, Ltd. ("Gibson") to enter into a marketing agreement whereby Gibson would market a visbroken bitumen product to be produced by Solv-Ex at a proposed plant to be built at Least 5.

Ex. 107. Visbreaking is a thermal process utilized to break down heavy molecules into lighter molecules, in order to produce from bitumen in a lighter product such as gasoline, as well as a heavy residue product. Logwinuk video testimony.

11. According to Mr. Campbell, the Gibson letter of intent was particularly important because unless you had a market outlet for it, financing would not follow.

12. On July 24, 1995, Solv-Ex announced in a press release that it acquired the Fort Hills oil sands lease, located adjacent to Lease 5, covering approximately 50,000 acres and containing, according to preliminary estimates, approximately 3 billion barrels of recoverable oil. Ex. 775, ¶ 1.

13. By August 1, 1995, Solv-Ex reported to its shareholders that the permit applications and Environmental Impact Assessment for development of Lease 5 had been filed with the Canadian government. Ex. 776, p. 1.

14. In the September 26, 1995 press release, Mr. Rendall stated that the upgraded bitumen process together with the Gibson marketing agreement "assures product marketability and should yield production in excess of design capacity of 14,000 barrels a day of heavy oil, according to the final audit report." Ex. 781, ¶ 1. Plant "commissioning ... (is) targeted for late 1996." Id., at ¶ 5. Financial presentations have been well received according to Solv-Ex's financial consultant, Charter Oak Capital. Id., at ¶ 6. The proposed plant was to consist of four logwasher "circuits." Exs. 104, 106, 506.

15. In the December 12, 1995 press release, Solv-Ex announced that it received formal approval from the Alberta Energy and Utilities Board to proceed with construction on Lease 5 of the oil extraction plant (with subsequent construction of a minerals processing plant to follow). Ex. 787, ¶¶ 1, 2. The target date for commencing production of the oil extraction facility was to be late 1996 or early 1997. Id., at ¶ 5. The capacity could exceed 10,000 barrels of oil per day depending on the blend and the feed rate of the bitumen. Id., at ¶ 1. At the request of Solv-Ex, the permit characterized the plant or project as "experimental" in order to ensure that: (i) the royalty to be received by the Crown on production would be limited to one percent (1%) until Solv-Ex requested commercial status for the plant; (ii) Solv-Ex would not be prejudiced in applying for certain research and development tax credits for the new plant under Canadian tax law; and (iii) no public hearings would be needed to secure the additional necessary permits. Ex. 520.

16. On January 17, 1996, Solv-Ex announced in a press release that it had entered into a letter of intent with Ledcor Industries, Ltd. for construction of the planned 14,000-barrel-per-day oil extraction and upgrading plant on Lease 5 (at an estimated capital cost of $100 million). Ex. 792, ¶ 1.

17. Solv-Ex raised $73 million from various sources, including investors, in 1996.

18. Mr. Rendall stated in a conference call on February 9, 1996 that Solv-Ex's objective was to produce oil at $5 to $6 per barrel in early 1997. Ex. 795, pp. 4,

5. Mr. Rendall also stated that approximately $200 million was needed to complete all of Solv-Ex's projects. Id. at p. 9.

19. In a conference call on March 26, 1996, Mr. Rendall stated that the schedule envisioned meeting the objective of completing construction by year-end, with planned cash flow by mid-1997 and full production by year-end 1997. Ex. 802, pp. 3, 14, 15.

20. In the August 19, 1996 conference call, Mr. Rendall expressed Solv-Ex's intent, based upon available capital, to start production in the first quarter of 1997.

21. In the August 22, 1996 press release, Mr. Rendall stated, "We have sufficient funds on hand to ensure our facility will become operational on a commercial basis...(and) that the project is on schedule and under budget" during the first quarter of 1997. Ex. 812, ¶ 2. Mr. Rendall also indicated that there were delays in completing total financing caused by skeptical reports in the media about the viability of the Solv-Ex bitumen extraction process. Ex. 812, ¶ 3. Mr. Rendall further stated that "it has been necessary for us to adapt to the new circumstances in order to begin generating positive cash flow early next year and reach full production of pipelineable oil products later in the year." Id.

22. In the August 26, 1996 conference call, Mr. Rendall reported that construction was continuing and expressed the belief that Solv-Ex had the funds available to get into cash flow in the first quarter of 1997 if the plant was commissioned. Ex. 813, pp. 4-5.

23. At about this time, Solv-Ex realized they could not afford a visbreaker, so they decided to try to filter the bitumen to produce a much coarser product. Unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." Logwinuk video testimony.

24. To be salable, the bitumen recovered from oil sands must contain no more than .5% solids after it is separated from the sand. Ex. 20. To be pipelineable, bitumen must be "residue free." Ex. 104; Logwinuk trial testimony. Bitumen which cannot be transported by pipeline must be transported to buyers by truck. Exs. 104, 106.

25. In an August 26, 1996 letter to shareholders, Mr. Rendall stated that, although Solv-Ex still intended to produce "in excess of 14,000 per day of pipelineable oil ...in 1997," the company would instead commence production in early 1997 of "100,000 barrels per month" of filtered bitumen which would e "readily marketable" as a means of generating cash flow. Ex. 20. He publicly announced in the August 26, 1996 letter that Solv-Ex had now established through internal and independent testing that it could consistently produce filtered bitumen from Lease 5 which met the .5% solids specification necessary for marketability without using the visbreaker. Id. This statement was without factual support and misleadingly optimistic as the independent lab work on filtration performed for Solv-Ex in August 1996 was not conducted on material from Lease 5; rather, it was conducted on a reconstituted material made from previously-processed oil sands extracted from a location outside Lease 5. Metcalf I, 140-143; Ex.

112. Nor did the results of those tests justify the conclusion Solv-Ex could consistently produce "readily marketable" bitumen through filtration.

26. Both Campbell and Rendall knew the letter of intent with Gibson required a visbroken product and that they had not even presented, much less executed, a marketing arrangement for the filtered bitumen. However, they failed to disclose that they had no proven way to filter the bitumen and that they had no marketing agreement to sell the filtered product even if they could produce it. The failure to disclose these facts was material and made the August 26 letter to shareholders misleading.

27. On October 1, 1996, Solv-Ex first submitted an order to the Mott Corporation to begin design and then construction of a 44-inch filter for installation at the Lease 5 plant in hopes it could be used to filter the bitumen on a production level. This was completely unproven technology. Nonetheless, in the October 18, 1996 conference call, Mr. Rendall stated that he saw no delays to the company's targets for completing the oil extraction plant for commissioning in the first quarter of 1997. Ex. 824, p. 1.

28. In an October 14, 1996 telephone conference call with investors, securities analysts and broker-dealers, Mr. Rendall reiterated that production of filtered bitumen would commence during the first quarter of 1997. Ex. 25. During the same conference call, Mr. Campbell stated that the bitumen to be produced would meet "commonly accepted specifications, both in terms of contained water and solids." Ex. 25, p. 3. Given that sand from Lease 5 had never been processed and Mott had only been retained to begin

to design a completely untested filter only two weeks earlier, these statements were without factual basis and completely unrealistic Both Campbell and Rendall failed to disclose they had no proven technology to filter Lease 5 bitumen or a committed marketer for such a product.

29. On October 28, 1996, Solv-Ex announced that it was "on target to achieve production of heavy oil during the first quarter of 1997" at Lease 5. Ex. 26A. In the press release, Solv-Ex characterized the anticipated start-up as "a 'major milestone' which will establish the capabilities of its technology on a fully operational basis." Ex. 26A.

30. On November 27, 1996, Solv-Ex reiterated that it was currently constructing its Lease 5 plant, "with production scheduled for the first quarter of 1997." Ex. 29.

31. When it is clear the 44-inch production scale filter could not be designed and constructed in time to meet the widely publicized production schedule, Mr. Rendall directed Solv-Ex personnel to order a prototype 24-inch diameter Mott filter in November 1996. Fox video testimony.

32. In the December 3, 1996 conference call, Mr. Rendall stated:

> "[W]e are still on track with production of oil. Our schedule is for oil in the first quarter of 1997, and testing of the log washer with its ancillary fines reduction equipment will occur in December and January. Plus we are within our

> budge…[W]e plan to establish our pipelineable crude product by the fourth quarter of 1997, using a hydrovisbreaker …[A]s to the oil itself, the quality of the oil is exactly as currently being marketed by Gibson in the market."

Many aspects of this statement are false. Without proven technology, there was no realistic possibility the testing could occur in December or oil production in the first quarter of 1997. There was also no evidence Solv-Ex was or could produce the quality of oil currently being marketed by Gibson.

33. In response to a question as to whether Gibson had made any financial commitment during the same conference call, Mr. Campbell said, "Gibson is, in fact, moving forward towards securing equipment for the purpose of moving Solv-Ex's product to market." This was a false statement as Gibson had no marketing agreement with Solv-Ex and never indicated it was procuring such equipment. (To the contrary, since a pipeline was proposed for the near future, Gibson had already concluded a substantial investment in trucks was not prudent.)

34. During the December 3, 1996 conference call, Mr. Rendall also stated that "we have a $13 million contingency to keep to our original oil production schedule." He further stated, "…please remember that the successful operation of our plant in the first quarter is planned to bring in a revenue stream of $1 million per month, rising to $4 million by the third quarter." Also during the December j3, 1996 conference call, Mr. Rendall stated, "…we plan to establish continuous operation of three logwashers,

two of which will be installed in December of this year." Exs. 831, pp. 1, 2, 3; 30. This was materially false and misleading as the internal Solv-Ex objective as of December 1996, as communicated by Mr. Rendall to company personnel, was only to install one of the logwasher trains, and demonstrate that it could be operated to produce bitumen in some amount or separate some amount of bitumen from sand by the end of March 1997. Moreover, two weeks later in mid-December 1996, portions of only one logwasher train were on site. Ex. 30; Fox video testimony.

35. In spite of his statement in the December 3, 1996 conference call, Mr. Campbell first began negotiating an actual contract allowing Solv-Ex to sell filtered bitumen to Gibson in January or February of 1997.

36. On January 8, 1997, Solv-Ex concluded tests of the 4-inch filter on Lease 5 bitumen at the Albuquerque pilot plant; these tests actually revealed various operational problems and failed to produce bitumen meeting the .5% solids specifications. Exs. 111, App. B; 113.

37. In the January 10, 1997 conference call, Mr. Rendall stated Solv-Ex's objectives for 1997, among which were "establishing the capacity of one logwasher in the first quarter of 1997." Ex. 832, p. 1. He made his statement without disclosing the complete failure of the mini-model filter tests just two days before. Rendall also stated:

> Around the middle of February, when the plant is available for testing, we intend to test it with twelve test runs. We have

> defined the conditions of each test run. That would involve about 500 barrels a day initially, in February. Once we establish the conditions for continuous testing, we expect in March to be running at the rate of about 100,000 barrels a month.

Ex. 832, p.5.

38. In a January 10, 1997 conference call with investors, securities analysts and broker-dealers, Mr. Rendall reiterated that "[t]he full plant is expected to be completed around the middle of February for testing, and continuous production is planned for March." Ex. 31, p. 10.

39. In the January 21, 1997 press release, Solv-Ex stated that it is "well positioned to achieve its objectives…and is moving towards production of oil (bitumen) during the first quarter of 1997 from a plant currently under construction on its oil sands lease in Alberta." ex. 835, ¶¶ 7-8.

40. In the February 10, 1997 conference call, Mr. Rendall represented the status of the oil extraction plant in the following terms:

> Originally, we had planned to test the unit, extraction unit, which is in place, in February. We now have decided to move forward to the complete plant being available for shakedown and production in a continuous basis as a more appropriate way in which to handle this plant. The plant is a big plant, needs to be shaken down, and started up and not stopped. We

> have a team up there in training so that when the startup and shakedown occurs, we're ready for it. March for startup.

Ex. 839, p. 1 (¶ 10). Mr. Rendall further stated, "What we have to establish in the first quarter [is] that the equipment is lined up to produce the oil [and that] will produce a marketable oil. We are very confident the process works, and it works remarkably well. We just have to shake down the equipment to establish it." Id. at p. 5. This is a material misstatement since there was no factual basis from which Rendall could conclude the process worked at all at the production level much less "remarkably well." It is also inaccurate in that most of the full scale equipment had not even been installed, much less operated to actually produce a marketable product. Mr. Rendall was also aware that the filtration problems continued and no bitumen meeting Gibson standards had ever been produced from Lease 5.

41. In the February 25, 1997 conference call, Mr. Rendall voiced his opinion that "this thing will run immediately" and "[w]ithin a day I'll be producing good oil," but "it's not a fact until I do it." Ex. 842, p. 7 (¶ 5). Also, he reiterated the goal of "[m]arketable oil by the end of the first quarter." Id., at p. 2 (¶ 9). This hyperbole could be excused except that it fueled the unrealistic expectations created by Rendall's earlier misrepresentations.

42. In the March 6, 1997 press release, Solv-Es stated that it "expects to commence oil production form its first-stage plant in Alberta before the end of March 1997." Ex. 846, ¶ 1. According to the project

manager, Steve Lane, "all equipment required for primary extraction of heavy oil (bitumen) is in place and work is totally proceeding on schedule to complete final electrical, piping and instrument installations." Id., at ¶ 2. This is misleading as it fails to disclose this equipment was experimental and no proven product has even been produced.

43. On March 29, 1997, Solv-Ex personnel attempted the first test of the equipment at the Solv-Ex Lease 5 Alberta site. Ex. 111, App. F. At a very early point in the March 29, 1997 test of the plant, Solv-Ex personnel determined that modifications in the water circulation and clarification circuit at the Alberta plant would be needed to achieve continuous operations. Ex. 111, App. F. Moreover, as of March 29, 1997, no installation of automatic instrumentation to record temperature, steam pressure and flow rates during the bitumen extraction process had been completed so production scale operation was still purely theoretical.

44. During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the logwasher train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of the fine particle solids, the filters were "blinded" and the logwasher had to be shut down after just 12 hours of operation. Ex. 111, App. F; Fox video testimony. Messrs. Campbell and Rendall were both aware the filtration problem had forced the shutdown. Recognizing this would make all prior bitumen production predictions completely impossible, Mr. Campbell told Mr. Rendall the NASDAQ and others were expecting production by the end of March, so they better issue a statement.

After numerous conversations with Mr. Rendall, Mr. Campbell drafted a press release at 6:00 a.m. on March 31, 1997 and faxed it to NASDAQ. Solv-Ex announced that "bitumen production had commenced" at its Lease 5 oil plant. Ex. 35A. This was a material misstatement clearly designed to mislead investors.

45. In an April 7, 1997 conference call, Mr. Rendall stated, "...we have produced oil in a commercially-sized module on our lease in the Athabasca oil sands of Canada." He represented the plant as "operational." He concluded, "Our oil process works in a commercially-sized module." Ex. 851. This was a material misrepresentation of fact designed to mislead investors.

46. It was not coincidental that on April 15, 1997 Solv-Ex announced it had "placed" $22 million in debentures which could be converted into Solv-Ex common stock. Ex. 853.

47. Following the March 29, 1997 start-up of the Lease 5 logwasher, both Messrs. Campbell and Rendall knew Solv-Ex operated the logwasher only for an isolated test and demonstration runs of no more than six hours. Neither took any action to correct the overly optimistic predictions they had made with regard to the timing or amount of production from the Alberta plant.

48. Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype Mott filter on April 21, 1997. Exs. 108, 110, 111; Fox video

testimony.

49. After two to three cycles of operation of the prototype plant at Least 5 on April 21, 1997, operational problems developed with the logwasher circuit which again required that the system be shut down. Ex. 111, p. 11.

50. The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. Moreover, the production could not be duplicated. Ex. 110; Fox video testimony.

51. In the April 30, 1997 press release, Solv-Ex reported it was "pleased with the initial testing, the primary extraction circuit worked well in the commissioning process [and] that testing would now be focused on the bitumen cleaning system which follows primary extraction." Ex. 854, ¶ 4. It was also stated the quality of the bitumen produced in primary extraction to date is better than expected. The press release further stated that "we do not believe we will have difficulty in producing on a continuous basis bitumen which meets market specifications. Our objective is to...be in a continuous operation by the end of May." Ex. 36. There was no factual basis to support any of those statements, except perhaps that relating to the quality, as it does not attribute the "expectation" to any source. These are material misstatements of fact.

52. Solv-Ex was never able to sustain continuous operation of the logwasher or to produce oil at the Alberta plant.

53. Solv-Ex never finalized any marketing agreements with Gibson for any filtered bitumen product from Lease 5 and therefore had no reliable method to market filtered bitumen even if it had been able to produce it.

Minerals

54. In 1994, Solv-Ex announced it had discovered that it could produce bitumen from Athabasca tar sands by a process which did not use solvents and did not generate toxic tailings.

55. In a further effort to ameliorate the environmental impact of mining bitumen, Solv-Ex obtained more than 100 tons of toxic fine tailings (commonly known as sludge) generated by the nearby oil sands processing plant operated by Suncor. Ex. 776, p. 2. From 1992 through 1994, Solv-Ex conducted several laboratory and pilot plant tests on these tailings and discovered some potential to extract and produce minerals and synthetics from them and detoxify the tailings for acceptable land fill. Ex. 785, p. 4. Solv-Ex also conducted mineral tests on the fine clay derived from oil sands from Lease 5 for gold, titanium and other mineral extracts. Exs. 502-504, 525, 548-550, 729, 732.

56. In August 1993, Solv-Ex announced that the initial phase of testing and evaluation of its program for commercial recovery of metals had been completed by processing about 100 tons of Suncor pond sludge tailings.

57. Soon thereafter, Solv-Ex announced its ability to

produce a "unique" form of aluminum oxide (commonly called "alumina") from the oil sands clays. Exs. 11, 33. The alumina would be extracted as a by-product from the tailings produced from processing the bitumen. Solv-Ex touted this form of "co-production" as being both more environmentally friendly and more economically successful than existing methods of bitumen extraction. From at least 1994 to 1999, Solv-Ex made a concentrated effort to make a type of aluminum oxide that was suitable for making metallic aluminum.

58. On October 5, 1993, Solv-Ex announced that roasting of the double salts in the process of producing the alumina generated an intermediate product which had properties suitable for insulation. In January 1997, the company announced it had been issued a patent for this insulation including shaping it into rigid forms. Ex. 32. No market was developed and it was never produced.

59. By December 1994, Solv-Ex had completed the feasibility study that provided a complete technical and financial description of the project. Ex. 506. The feasibility study: (i) defined the design for a co-production facility on Lease 5 to produce 10,000 barrels per day of pipelineable crude oil ("PCO") and 64,000 tons per year of alumina to be custom smelted and sold as aluminum; (ii) provided detailed estimates of capital and operating costs for the facility (together with projected revenue streams); and (iii) provided a comprehensive analysis of the project as a whole to determine the amount of financing needed for the project. Ex. 506, pp. 1-3, 5-2. Solv-Ex estimated the capital cost of the oil extraction facility at $95 million and the mineral

processing plant at $25 million. Ex. 506, p.5-1.

60. The feasibility study stated that it would be subjected to a two-part technical and financial audit in early 1995. The Pace Consultants, Inc. ("Pace"), an independent consulting firm with expertise in hydrocarbon processing and marketing, was retained to review the bitumen extraction and PCO production sections of the planned plant. Ex. 508. Cumming Cockburn, Ltd. was retained to update its January 1994 financial and technical audit for the minerals processing portion of the co-production facility. Ex. 550.

61. Subsequent research further showed that basic potassium aluminum sulfate (BKAS") could be produced frothily residue tailings as yet another intermediate product in the production of alumina. Exs. 549, 589, 596, 602-603, 637A, 638. Solv-Ex compared, and attempted to market, its BKAS as similar to a naturally occurring mineral, Titanium Dioxide ("Ti02"), the "Rolls Royce" of paper coating and fillers. Solv-Ex renamed the synthetic mineral "Titanium Dioxide Substitute or TI02S."

62. Natural Titanium Dioxide displays superior optical qualities, and consequently sells for roughly $2,000 per ton, compared to much lower prices for other common pigments, such as calcined kaolin ($550 per ton) and precipitated calcium carbonate ("PCC") ($150-200 per ton). Ex. 52, pp. 5-16. Solv-Ex commissioned various tests to show this synthetic mineral had potential applications as a filler in the production of photocopy paper, glossy paper, ink, plastic and coatings. Exs. 653, 692, 699, 701-702.

63. In pursuit of other potential applications of Ti02S, Solv-Ex commissioned testing which resulted in a preliminary report from D.L. Laboratories ("D.L. Labs"), dated July 26, 1996. Solv-Ex, however, had great difficulty in producing sufficient quantities of Ti02S for testing. By September 1996, only minimal quantities of TI02S had been delivered for testing by D.L. Labs, for possible use as a paint additive. Exs. 60; 567. The first test by D.L. Labs showed that the small Ti02S sample delivered did not grind well enough to be acceptable. Ex. 567. The report of D.L. Labs' second test cited the determination that Ti02S "cannot be readily incorporated into [paint] coatings formulations." Ex. 60. D.L. Labs recommended substantial further study. Ex. 588, p. 4.

64. In June 1996, Solv-Ex also had Ti02S evaluated by Utility Development Corporation ("UDC") as a potential filler for plastics. UDC reported that the Solv-Ex product appeared to serve as a potentially acceptable filler in certain plastic application trials, but recommended different surface treatments so that the product could be a cost effective competitor. It also recommended that Solv-Ex evaluate a finer particle size. Exs. 46, 587.

65. In a September 5, 1996 conference call, Mr. Rendall stated that "[i]n terms of paint [Ti02S] meets the specifications. In the case of fillers for [plastics] resins, it also does." Ex. 816. Any reference to the UDC or D.L. Labs tests which did not support this conclusion was omitted.

66. Pilot plants to produce paper pigments typically cost several million dollars to construct, and must have a

capacity of approximately 250 liters. The purpose of the pilot plant is to produce tanker-truck-sized samples, each of some 15 to 20 tons in size, for field trials by paper manufacturers. Gann trial testimony. Solv-Ex attempted to scale up its production of Ti02S in its pilot plant in spring 1997 and to meet specific requirements for particle size. Ex. 72; Metcalf 195-96, 96-97. Solv-Ex was not successful in its attempts to produce Ti02S at the required particle size at the pilot plant level. Ex. 72; Metcalf I, 95-96.

67. As of fall 1996 and continuing to at least March 1997, Solv-Ex's Albuquerque pilot plant equipment was still only capable of making 50 to 100 pounds of Ti02S per day. Nielsen 304.

68. As reported by UDC and D.L. Labs, the Ti02S particles that Solv-Ex produced in its pilot plant reactors remained too large for its anticipated industrial applications. Metcalf I 112-113; Nielsen 160-161, 263. Solv-Ex's attempts to reduce the particle size Ti02S by grinding it with its own laboratory equipment proved unsatisfactory. Nielsen 160. Although grinding equipment was shown n flow sheets for the proposed minerals plant in Alberta, Solv-Ex never installed or tested the grinding equipment in its Albuquerque pilot plant. Nielsen 263, 315.

69. In a September 6, 1996 press release, Ex. 22, the company announced:

> Progress has been excellent in development of markets for the products which can be produced from the fine clays, particularly

- in view of continued testing of the new Solv-Ex cell for production of electrolytic aluminum and independent testing to date of a potassium-based synthetic mineral which appears quite suitable for the huge filler markets in paper, paint and plastics.

  Solv-Ex said that it continues to believe that the fine clays represent a source of minerals and metals which greatly exceed the value of the oil contained in the oil sands and that the tailings can become a tremendous asset rather than a major item of environmental controversy. It has been publicly estimated that more than a billion tons of the tailings, which many observers consider to be highly toxic, will be in place by the year 2010, much of which is in close proximity to the Athabasca River. (Emphasis added.)

At the time of this press release, there was no factual basis to conclude TI02S was "quite suitable for the huge filler markets in paper, paint, and plastics." Mr. Campbell prepared the press release and knew of no data to support these conclusions. Even if he quoted Mr. Rendall, which he gave no indication of, a corporate officer should not be allowed to publish material misrepresentations without any legal responsibility.

70. In May 1996, a Solv-Ex consultant, Dr. George Ionides, issued the "Papermaking Pigments Market Study" to define potential markets for papermaking pigments in the regions of North America which could be economically served by the Solv-Ex mineral

pigment production plant in Alberta. After interviews with four senior paper/pigment industry technical experts, Dr. Ionides concluded that with its "anticipated" properties Ti02S could sell in the range of $600-$800 per ton. Exs. 657, p. 5-16; 662, pp 1-2. Mr. Rendall testified it could be produced for about $200 per ton.

71. Dr. Ionides arranged for Ti02S to be tested in papermaking trials by William Forester at Western Michigan University ("WMU"). Solv-Ex tested 400 to 450 pounds of Ti02S as a paper filler in formulations for two types of paper on October 2, and 3, 1996 (the "October trial"). Because the amount of Ti02S retained in the uncoated wood free paper had not reached Forester's target level, the WMU tests were inconclusive, and Dr. Ionides requested that WMU re-run that trial according to instructions provided by him. Ex. 54. Subsequent tests were scheduled for November.

72. During the subsequent November trial, because of Ti02S the sheet strength suffered and the paper was very "soft." Ex. 56. The lack of strength was reflected in some breaks in the paper made with the Ti02S filler. Forester 22. During the November trial, the poor retention of the Ti02S also caused a large build-up of the Ti02S filler on the wet end of the paper machine and thus excessive foam. Ex. 56. This prevented the machines from running efficiently.

73. After the November trial, Mr. Forester recommended further testing to determine how to regain the paper strength lost from the addition of the Ti02S. Ex. 56. Mr. Rendall was aware of Mr. Forester's November

4, 1996 recommendations, but did not publicize them or the results of the tests.

74. On or about November 20, 1996, Solv-Ex and Raisio Chemicals ("Rasio"), an international distributor of chemicals, entered into a letter of intent for the purposes of conducting additional tests on Ti02S. Ex. 698, p. 1. The alliance between Solv-Ex and Rasio was announced in Solv-Ex's November 27, 1996 press release. Ex. 830, ¶ 1. The press release stated that "the alliance with Raisio contemplated an aggressive testing schedule which could accelerate plans for commercial production if testing proceeds in line with expectations." Ex. 29. The results of the Forester tests were not disclosed and this was a material omission.

75. At the end of November, Ti02S had not been successfully tested for any commercial application. Nonetheless, in a December 3, 1996 conference call, Mr. Rendall stated:

> (Ti02S) has similar characteristics to titanium dioxide pigment, including its light-scattering properties.
>
> With a view to securing the highest value for this product (Ti02S) which is in coatings for high quality paper, the company has embarked on an aggressive market-driven program with Raisio Chemicals. Thousands of pounds of product from our test center in Albuquerque will be used in various coating formulations in Raisio's multimillion-dollar facilities to produce

> high-quality paper in the first quarter of 1997. Based on successfully reaching our objectives, the second quarter will involve paper mills, and the third quarter should see hundreds of tons of product from Lease 5 commercially used to secure long-term contracts for continuous production in the fourth quarter of 1997.

Ex. 831, p. 1 (¶¶ 7-8) (emphasis added). This statement was completely hypothetical and overly optimistic since the "Albuquerque center" had not produced thousands much less any significant quantity of pounds of product. Nor was it disclosed that all tests of Ti02S as a paper additive had failed to produce a satisfactory formula.

76. As of January 1997, Raisio merely had performed an "initial evaluation" of but three minute 400-gram samples of Ti-2S as an additive in paper coatings and the Albuquerque test plant clearly did not and could not produce the "thousands of pounds of product" Mr. Rendall had represented would be tested in the first quarter of 1997. Ex. 58.

77. Solv-Ex never determined a filler or coating application to which Ti02S should be targeted. In the absence of such a target Solv-Ex could not determine what specifications Ti02S would have to meet, much less determine how to achieve such specifications.

78. Solv-Ex never even implemented a reliable cost-effective means of reducing the particle size of Ti02S to meet the requirements for either paper or paint applications. Exs. 61, 63, 590, 604, 606.

79. In the January 31, 1997 press release, Mr. Rendall stated that Solv-Ex's "target is to be in construction of the minerals extraction plant during the first half of 1997 and achieve production before the end of the year." Ex. 837, ¶ 4.

80. In the February 10, 1997 conference call, Mr. Rendall disclosed the plans for production of TI02S at the rate of one ton per month at the Albuquerque pilot plant for testing from April or May, 1997. Ex. 839, p.6 (¶ 3). There was no factual basis that could legitimately support such plans and Mr. Rendall's excessive optimism was intentionally misleading.

81. Solv-Ex's pilot plant never produced a large enough quantity of Ti02S to conduct the necessary production-scale tests for any commercial application. Nielsen 85-86, 211; Metcalf II 185-186.

New Method of Aluminum Production

82. In late 1994, Solv-Ex tested a prototype cell to manufacture industrial grade aluminum from the alumina extracted from the Athabasca clay. The test proved the process was theoretically possible and Solv-Ex decided to upscale to the larger lab size version.

83. In the February 21, 1995 press release, Solv-Ex announced that Pat Davey, a longtime international consultant for aluminum projects of Kaiser Aluminum Corporation, had joined the board of directors to head development of the production of aluminum from the alumina produced by Solv-Ex at the "co-production plant" in Alberta, Canada. Ex.

764. In the press release Mr. Davey is quoted as saying:

> The alumina produced using the Solv-Ex technology is extremely high quality and can offer significant opportunities, as well as production efficiencies and environmental benefits, for existing smelters. The possibility of further expanding our horizons through use of this alumina in a new type of electrolytic cell is particularly exciting...

In that press release Solv-Ex also disclosed:

> For about a year, work has been under way at Solv-Ex on new cell design and technology, which has been demonstrated at laboratory scale. Patent applications have been filed, and Solv-Ex plans to build and operate a cell capable of producing one to two pounds of aluminum per hour at its Albuquerque plant.

84. In a presentation at a professional conference held on April 3, 1995, Solv-Ex described the general process of how alumina could be produced from clays contained in the Athabasca oil sands. Ex. 765. The proposed 10,000 barrel per day Solv-Ex oil facility was to produce between 64,000 to 100,000 tons pre year of such alumina. Id., at p. 3, slide 23 (at p. 588031).

85. In a May 8, 1995 conference call, Mr. Rendall stated:

> [W]hat I'm doing now is lining up the pilot plant here to produce one to 200 pounds of alumina, and one to 200 pounds an hour of other products. So that I've got it market in tonnage, so that when I kick off the sludge project at the end of this year, I have sold everything, that this solves cash flow problems.

Ex. 767, p.6.

86. In the June 5, 1995 conference call, Mr. Rendall stated that Solv-Ex is on track for the alumina project and that the production goals remain unchanged. Ex. 771, p. 4.

87. In the August 1, 1995 Management Letter to Shareholders, Ex. 776, p.2, Mr. Rendall summarized the projected plan for the Synthetic Minerals Plant:

- Up to 100,000 tons per year of alumina products
- Up to 200,000 tons per year of synthetic minerals from waste
- Capital estimated at $20 million for initial production - expansion at $15 million
- Marketing for synthetic minerals by ITC Corp.
- Cash flow in early 1996
- Complete review and audit of feasibility by Cumming Cockburn, Ltd.
- Projected operating costs of $25 per ton for all products
- Permits expected in September
- Experienced project management in place

88. On August 2, 1995, the Solv-Ex aluminum team completed the "Start-up and Operating Procedures" for a "2700 Ampere Pilot Cell." Ex. 755. The overall purpose of the test was to determine whether Solv-Ex alumina (to be produced from actual Lease 5 tailings) could produce metallic aluminum at 750°C in a more efficient vertical configuration of the anodes and at approximately 200°C lower than the temperature needed in existing commercial cells. If successful, both of these would be major breakthroughs in the production of aluminum since a large part of the cost of production derives from the dual costs of anode replacement and electricity.

89. In the August 28, 1995 press release, Solv-Ex announced that it had entered into a memorandum of understanding with Glencore, Ltd. (the world's largest trader of metallurgical grade alumina) for initial marketing of metallurgical grade alumina to be produced from oil sand tailings on Solv-Ex Lease 5. The announced agreement contemplated a $10 million advance to assist in project financing. Ex. 778, ¶ 1. However, no advance was ever made as definitive agreements were not reached by the October 31, 1995 deadline. Ex. 783, ¶ 2. This was never publicized by Solv-Ex.

90. On or about December 8, 1995, the Solv-Ex aluminum cell team attempted to start the prototype electrolytic cell, but they were not able to reach a high enough temperature with internal heaters to process the Solv-Ex alumina and cancelled the experiment after 48 h ours. Vondrak Ex. 4, Ex. 1082.

91. The stated objectives of the test were:

i. To verify that electrolysis of an Alumina suspension in the alumina saturated low-temperature eutectic NaF-A1F3 electrolyte is practicable on a large scale.

ii. To operate the Pilot Cell to develop operating parameters and procedures.

iii. To determine the physical and electrical characteristics of the electrolyte.

iv. To determine the effect of electrolyte composition and contained alumina variations on cell operation.

v. To determine material losses and air pollution control requirements.

vi. To determine production efficiencies.

vii. To verify cell and electrode construction, heat balance and electrode life.

viii. To develop a nonconsumable anode.

Ex. 755, p. 1. While the team arguably had some very limited success on (i) and (ii), the remaining goals were not even partially met. Vondrak pp. 86-91.

92. In the 1995 Form 10-K, Solv-Ex announced that:

> Work performed...at (its) Pilot Plant has resulted in production of alumina which

> meets specifications for metallurgical grade alumina ... through standard ... processes. Evaluation of the Company's process by both independent consultant and sources with the alumina/aluminum industry has confirmed the ability to achieve these results within projected operating costs.
>
> ****
>
> Although considerable work must be performed to determine total feasibility of the process (for producing aluminum meta [as opposed to alumina]), the results of testing to date have been very encouraging and the Company has applied for patents with respect to the new process.

Ex. 863 at 10 ¶ 5; 13 ¶ 3 (emphasis added). These statements were designed to mislead investors as no quantity of alumina was, or could be, produced "which meets specifications for metallurgical grade" and certainly not through anything approaching "standard processes." Nor was there any evidence either the Company or an independent consultant had confirmed this could be done at competitive costs.

93. On January 18-19, 1996, Solv-Ex again attempted to operate the prototype electrolytic cell. Solv-Ex personnel began heating the cell on January 18, 1996, and the heating system again failed. Ex. 75. Solv-Ex shut down the cell after it began leaking electrolyte a second time, the cell experienced arcing (electrical shortening through sparks), and the cell temperature dropped below the required operating level. Vondrak p. 65; Ex. 75, pp. 533002, 533004-5;

Kennedy p. 42.

94. Solv-Ex shut down the operation to prevent the cell from damaging itself further through the arcing and cooling. Kennedy p. 45. The copper anodes used in the prototype cell were destroyed during the test. Ex. 76, pp. 534002, 534004, 534008; Kennedy p. 86. At the time of the test and during the autopsy of the cell, Solv-Ex personnel were unable to objectively confirm that the prototype electrolytic cell actually produced any measurable quantity of aluminum during the test. Vondrak pp. 90-91; Exs. 76, pp. 534012-13; 757 Strahl letter. In short, the test was an unmitigated failure.

95. The summary section of Solv-Ex's internal autopsy report on the cell test states that the "[a]utopsy of the 2700 Ampere Pilot Cell indicated serious problems in the materials used and construction of the cell." Ex. 76, p. 534002. A letter attached to the internal autopsy report states that "[t]he existing cell design served its purpose in showing how difficult it is to design a new process without full appreciating its complexity. We have learned that both the materials of construction used and the existing design are incapable of sustained operation." Ex. 76, p. 534010.

96. The outside expert, Dr. Erwin Strahl, retained by Solv-Ex to create and control the electrolyte bath in the cell, concluded "as a result of our testing to date and the autopsy observations, some very fundamental problems need to be readdressed." Ex. 757.

97. Had the test of the prototype 2700 ampere electrolytic cell been a success, the process engineer at Solv-Ex would then have recommended the

building and testing of a prototype 10,000 ampere cell. Vondrak pp. 94-95. Rather than advancing to the 10,000 ampere cell, however, after the test of the prototype 2700 ampere electrolytic cell, the process engineer and chemical engineer jointly proposed reducing laboratory tests on the cell back to laboratory bench scale where they had experienced some limited success in 1995. Vondrak p. 91; Ex. 76, p. 534013.

98. On January 23, 1996, Solv-Ex issued a press release authored by Herbert Campbell. (Ex. 11). It says *inter alia*:

> Solv-Ex has successfully completed initial testing of its new aluminum reduction technology and prototype electronic cell, Solv-Ex Chairman and Chief Executive Officer John S. Rendall announced today. The Solv-Ex cell was operated at a temperature of 750 degrees centigrade, which is more than 200 degrees centigrade lower than used in existing aluminum smelters. The test used no consumable electrodes and a unique grade of highly porous alumina which is produced at the company's test facility in Albuquerque.

These statements are false and misleading. The December 1995 and January 1996 testing could not be considered "successful" by any accepted definition of the term and Mr. Rendall knew facts directly contradicting such an assessment. The statement is also misleading in referring to the lower temperature because the process produced no measurable quantity of aluminum and the

"nonconsumable electrodes" were in fact consumed. Based on the technical nature of these tests and Mr. Campbell's attribution of the conclusions to Rendall, Campbell may be excused from responsibility for propagating these falsehoods. (Tr. 932-7; 950). However, at least by the following day, Campbell became aware the cell had sprung a leak during the test and had to be shut down. (Tr. 956-8) Following the autopsy of the cell, neither Mr. Campbell nor Mr. Rendall took any action to correct the misrepresentation of success created by the January 23, 1996 press release.

99. Solv-Ex issued another press release on February 26, 1996 stating, among other things, that "[f]inally, our new cell for commercial operations (which will now be proven in the field) involves panels of about 6'0" x 6'0" compared with the approximate 2'0" x 2'0" panels we are currently working with in Albuquerque. The scale up factors are quite reasonable." Ex. 13, p. 3. this is a complete distortion of the actual facts as the cell tests were in reality being scaled back to bench scale and not up to production scale. This document was apparently drafted by Mr. Butler and revised by Mr. Campbell.

100. Solv-Ex then issued a March 11, 1996 press release stating, "The primary mineral of interest in the clays is alumina, and Solv-Ex announced in January 1996 that it had successfully tested a new design of an electrolytic cell to produce aluminum metal from the alumina." Ex. 14 I (emphasis added). BY any objectively reasonable definition of "successful," this was completely untrue.

101. In an August 26, 1996 letter to Solv-Ex shareholders,

Mr. Rendall wrote that "[w]e have made further progress since the cell was first tested successfully in January of this year and we see no 'show-stoppers' in proceeding to installation of one or more commercial cells as soon as the mineral extraction technology has been demonstrated on a commercial basis." Ex. 20.

102. In the September 5, 1996 conference call, Mr. Rendall stated that "[w]e are getting the aluminum cell working continuously. We have proven out a dimensionally stable anode. We intend next year to have a prototype working to put up a commercial plant." Ex. 816, p.6 (¶ 12). An "aluminum cell working continuously" never existed and this is a total fabrication intended to mislead investors.

103. In the September 10, 1996 press release, Mr. Rendall stated that Solv-Ex received a patent for the new electrolytic cell first "successfully" tested in January 1996. Ex. 818, ¶ 1. He also stated that Solv-Ex had made "significant headway in confirming the ability to utilize nonconsumable anodes on a consistent basis." Id., at ¶ 2. There is no believable evidence of the ability of Solv-Ex to create test or use nonconsumable anodes.

104. In the December 3, 1996 conference call, Mr. Rendall stated, "We have further developed an aluminum cell to the stage of continuous production with a nonconsumable anode at bench scale." Ex. 831, p.2. This was also a material misstatement of fact.

105. Solv-Ex never produced or successfully developed a nonconsumable anode for production of metallic aluminum. Kennedy pp. 91-92.

106. Rendall, Campbell and Solv-Ex never disclosed to the investing public that after the test of the prototype 2700 ampere cell, Solv-Ex was forced to scale back its testing to laboratory scale.

107. Solv-Ex's 10-K and amended 10-K for the period ending June 30, 1996 contained misleading statements regarding the status of Solv-Ex's aluminum reduction cell testing and technology. Exs. 40, 40a.

Summary

108. John Rendall had a dream to revolutionize the two industries in which he had worked: bitumen extraction and aluminum production. That dream blinded him to the practical scientific impediments to the fulfillment of that dream. When confronted with negative results, "he would have a tendency to ignore that information or work around it or repeat the experiment over and over and over again." Metcalf p. 221.

109. Collectively read, the press releases, shareholder letters, and other statements, which Defendants disseminated on a virtually weekly basis, created the false impression that Solv-Ex was on the verge of generating revenues from the alumina, Ti02, and bitumen production. In fact, the evidence demonstrates that at the time many of these statements were disseminated, Solv-Ex was in various stages of research and development with respect to the three technologies, but that commercial exploitation of any of them was never more than a theoretical possibility, and this was never disclosed.

Conclusions of Law

1. At all times relevant to the complaint, Solv-Ex was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act").

2. Solv-Ex was therefore required to file periodic reports with the Commission pursuant to Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

3. In enforcement actions, the Commission "appears…not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2nd Cir. 1975).

4. This enforcement action involves a pattern of statements issued by a public company and its two key executive officers that created the misleading impression that each of three revolutionary new technologies being developed by the company was a virtually unqualified success. The pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with substantial revenue stream, was not only assured, but would occur in the very near future.

5. Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. 240.10b-5] and Section 17(a) of the Securities Act of 1933

("Securities Act") [15 U.S.C. § 77q(a)] prohibit persons and entities from, among other things, making material misstatements or omitting to state material facts in connection with the purchase or sale of any security. Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974); see generally Thomas Lee Hayen, 2 THE LAW OF SECURITIES REGULATION § 13.2 p. 461 (3rd ed.).

6. A statement is material if a reasonable investor would consider it important in determining whether to buy or sell a stock. Grossman v. Novell, Inc., 120 F.3d 1112, 1119 (10th Cir. 1997). "Material facts include those 'which affect the probable future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities.'" SEC v. Mayhew, 121 F.3d 44, 52 (2nd Cir. 1997) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2nd Cir. 1968)); See also Folger Adam Co. v. PMI Indus., Inc., 938 F.2d 1529 (2nd Cir.), cert. denied, 502 U.S. 983 (1991). An omission is material if there is a "substantial likelihood" that either "the omitted fact would have assumed actual significance" in the investment decision or "the omitted face would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S> 438, 449 (1976). Misrepresentations and omissions concerning the status and success of the development of commercially feasible core technologies for a development stage company having no revenue and no products are facially material. See Kaplan v. Rose, 49 F.3d 1363, 1374 (9th Cir. 1994) (misleading to use term "successful" to describe test results generally inconsistent with

success); see also SEC v. International Chem. Dev. Corp., 469 F.2d 20, 26 (10th Cir. 1972) (material omission not disclosing that patents were not proven commercially feasible).

7. When management and directors are parties to a securities fraud, the test as to causation is whether the facts not disclosed or disclosed in a misleading fashion significantly altered the total mix of information available. IIT, an Int'l Inv. Trust v. Cornfield, 619 F.2d 909 (2nd Cir. 1980). The false statements by the Defendants and their failure to disclose the full test results and reports of their consultants significantly altered the total mix. The Defendants' repeated issuance of press releases, which stated only the positive aspects of such tests, misled the investing public; especially because no corrective information was never disseminated.

8. "The misleading, misrepresented or untruthful character of the release may appear from the nature of the statement considered above, or, when the facts are fully disclosed, from the half truths, omissions or absence of full candor concealed therein." Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 97 (10th Cir. 1971); Gilbert v. Nixon, 429 F.2d 348, 356 (10th Cir. 1970); Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966).

9. Scienter connotes an intent to deceive, manipulate or defraud. City of Philadelphia v. Fleming Cos., 269 F.2d 1245 (10th Cir. 2001); "One is not to be held liable…because of his misleading misrepresentation or omission of material fact, the truth of the matter being unknown to the purchaser, if the party responsible for the misrepresentation or omission

sustained the burden of proving that he did not know, and in the exercise of reasonable care could not have known that it was a misrepresentation or omission." Clegg v. Conk, 507 F.2d at 1358. However, "there is a strong inference of scienter when defendants publish a statement known to be false or so contrary to available information as to suggest fraud." Florida State Bd. of Admin. v. Green Tree, 270 F.3d 645, 665 (8th Cir. 2001). When a group of inside officials contributes to documents such as annual reports and press releases, each must assume responsibility for material misstatements. In re Gleufield, Inc., 60 F.3d 591, 593 (9th Cir. 1995) (per Kelly, J.); Holtman v. Aura Sys., 844 F. Supp. 549 (C.D. Cal. 1993). See F.F. 92. The statements of corporate officials are of particular importance to investors; the investing public "justifiably places heavy reliance on the statements and opinions of corporate insiders." In re Apple Computer Sec. Litig, 886 F.2d 1109, 1116 (9th Cir. 1989). This would seem especially applicable to the officers of Solv-Ex since Campbell, Rendall, and, to a much lesser extent Butler, were responsible for the constant disclosure of all information to the financial markets. F.F. 39, 42, 51, 100.

10. Mr. Rendall made several intentional misstatements of material fact. See F.F. 25, 32, 34, 40, 44, 45, 65, 75, 98, 103, 104.

11. Mr. Campbell also intentionally made several misstatements of material fact. See F.F. 28, 33, 44, 92, 99.

12. A duty to disclose technical or developmental problems with a produce may arise where a company makes strongly optimistic or concrete statements

about that product that are in stark contrast to its internal reports. Glassman v. Computervision Corp., 90 F.3d 617, 635 (1st Cir. 1996); Kaplan, 49 F.3d at 1374 (defendant's use of term "successfully" to describe test results was inconsistent with common understanding of the term without more information). The duty to speak the full truth thus arises when Defendants make affirmative representations. Rubinstein v. Collins, 20 F.3d 160, 170 (5th Cir. 1994); Hadsell v. Hoover, 484 F.2d 123 (10th Cir. 1973); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 100.

13. Mr. Rendall omitted material facts in several instances in which he calculated the revelation of the whole truth would negatively impact Solv-Ex in the investment markets. See F.F. 26, 28, 37, 40, 74, 75, 98.

14. Mr. Campbell also omitted material facts when he calculated the revelation of the whole truth would negatively impact Solv-Ex in the financial markets. See F.F. 26, 28.

15. Representations pertaining to future events can be the basis of fraud when the defendant knows there is no reasonable factual basis for the representations or the speaker knows of undisclosed facts tending to seriously undermine the accuracy of the statement. In re HealthCare Compare Secur. Litig., 75 F.3d 276 (7th Cir. 1996); Rubinstein v. Collins, 20 F.3d at 166; In re VeriFone Secur. Litig. 11 F.3d 865, 870 (9th Cir. 1993); Bloomenthal and Wolff, 3D SECURITIES AND FEDERAL CORPORATE LAW § 20:4 p. 20-5 (1999).

16. Mr. Rendall's predictions as to future events were material misstatements of fact in that they were made without any factual support and/or in the face of contradictory and undisclosed factual evidence. See F.F. 25, 32, 34, 40, 75, 80.

17. Mr. Campbell's prediction of future events was a material misstatement of fact made without factual support and/or in the face of contradictory and undisclosed factual evidence. See F.F. 28.

18. John Rendall was vested with the power to direct and control, and did so, all aspects of Solv-Ex's business and was therefore responsible for Solv-Ex's misleading and incorrect statements in the official filings. As a control person of Solv-Ex pursuant to Section 20(a) of the Exchange Act, Mr. Rendall is directly liable for the company's reporting violations under Section 13(a0) and the rules thereunder. See Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2nd Cir. 973) (persons who have actual authority to direct the activities of the primary wrongdoer and have culpable participation in the activities are control persons within the meaning of Section 20(a)). See also Arthur Children's Trust v. Keim, 994 F.2d 1390, 1396-97 (9th Cir. 1993) (members of management committee were control persons because they made major business decisions affecting the venture).

19. Herbert Campbell was also a control person and had access to all of the negative tests and consultants' caveats which he chose to largely ignore in drafting the press releases which created a misleadingly optimistic picture of the prospects for each of the three Solv-Ex technologies. See Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 90.

20. Mr. Campbell was aware of facts from which he knew or should have known the prototype electrolytic cell leaded during the January 18, 1996 test, and was not the "success" he claimed in the January 23 and February 26, 1996 press releases. United States v. Schaefer, 299 F.2d 625 (7th Cir. 1962) (willful ignorance unavailing when others relying on representations of fact). See F.F. 98. Mr. Campbell knew or should have known that the information in Solv-Ex's 10-K filing was false or misleading. United States v. Benjamin, 328 F.2d 859, 861 (2d Cir. 1964) (corporate attorney cannot deliberately close his eyes and recklessly state as facts things he was ignorant of). See also Matter of Edward F. Duffy, 1995 WL 786625 (SEC 1995) (holding corporate attorney responsible for corporate press releases and securities filings he participated in). F.F. 92, 99. Even had his role at Solv-Ex been limited to that of corporate counsel, however, Mr. Campbell's conduct would be recklessly violative of the federal securities laws in that he both knew and was reckless in failure to verify erroneous factual statements he drafted. Rubin v. Schottenstein, Zox & Dunn, 143 F. 3d 263, 267 (6th Cir. 1998) ("[T]here is nothing special about [the defendant's] status as an attorney that negates his Rule 10b-5 duty to disclose, a duty that ordinarily would devolve under Rule 10b-5 upon a third party under these circumstances... An accountant or lawyer, for instance, who prepares a dishonest statement is a primary participant in a violation.") (citing SEC v. Coffey, 493 F.2d 1304, 1315 (6th Cir. 1974)). "Recklessness," defined as conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either

known to the defendant or is so obvious that the actor must have been aware of it, can satisfy the scienter requirement for section 10(b), Securities Exchange Act of 1934." City of Philadelphia, 264 F.3d at 1258.

21. Solv-Ex, Rendall, and Campbell violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

22. The European "trading program" was never implemented and therefore the restricted stock was never issued, thus no SEC reporting requirements were triggered.

23. Defendants rely on the "bespeaks caution" doctrine to shield their public statements. The "bespeaks caution" doctrine should be applied very carefully since it provides an incentive to misrepresent the truth. In re Donald J. Trump Casino Sec. Litig. - Taj Mahal Litig., 7 F.3d 357, 371 (3rd Cir. 1993). The cautionary statements in the Solv-Ex filings do not counterbalance the glowing projections in the Defendants' press releases and broker conferences. See Whirlpool Fin. Corp. v. GN Holdings, Inc., 873 F. Supp. 111, 123-24 (Non verbal response)..D. Ill. 1995); In re Colonial Ltd. Partnership Litig., 854 F. Supp. 64, 92-3 (D. Conn. 1994); In re First Am. Center Sec. Litig., 807 F. Supp. 326 (S.D.N.Y. 1992)

24. There is a reasonable likelihood that the Defendants will engage in future violations unless enjoined.

All tendered Findings and Conclusions not incorporated herein are deemed Denied.

DATED at Albuquerque this 24th day of September, 2003.

By: s/Bruce D. Black
Bruce D. Black
United States District Judge

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EXHIBIT A 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

No. 00-2339
(D.C. No. CIV-98-860-BB)
(D.N.M.)

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2004

PATRICK FISHER
Clerk

ORDER AND JUDGMENT

Before **HENRY, PORFILIO,** and **MURPHY,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

In this appeal, two officers of a start-up corporation, each now proceeding pro se, challenge the district court's determination that they committed securities fraud through a series of materially misleading public statements.[6] The Securities and Exchange Commission commenced this enforcement action against Solv-Ex Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 17(a) of the Securities Act of 1933, § 10(b) and § 13(a) of the Securities and Exchange Act of 1934, and the rules promulgated under those Acts.[7] The SEC contended that,

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6 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

7 Section 10(b) of the Exchange Act (15.U.S.C. SYMBOL 167 \f "Times New Roman" \s 11 78j(b)) and SYMBOL 167 \f "Times New Roman" \s 11 17(a) of the Securities Act (15 U.S.C. SYMBOL 167 \f "Times New Roman" \s 11 77q(a)) are general fraud provisions. Together with Rule 10b-5 (17 C.F.R. SYMBOL 167 \f "Times New Roman" \s 11 240.10b-5), they make it unlawful for a person or entity, in connection with the purchase or sale of a security, to employ any device, scheme, or artifice to defraud, to make an untrue statement of material fact, or to omit a material fact that is necessary to make the statement made, in light of the circumstances under which it was made, not misleading. Section 13(a) of the Exchange Act (15 U.S.C. SYMBOL 167 \f "Times New Roman" \s 11 78m(a)) requires the issuer of a security to file annual and quarterly reports with the SEC, and Rule 12b-20 (17 C.F.R. SYMBOL 167 \f "Times New Roman" \s 11 240.12b-20) provides that required filings with the SEC must include "such further material information, f any, as may be necessary to make the required statements, in light of the circumstances under which they are made[,] not misleading."

from January 1995 through April 1997, defendants issued a series of public statements in press releases, in letters to shareholders, in conference calls with investors, brokers, and security analysts, and in filings with the SEC, that created the misleading impression that each of three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc. 90 at 1.

Following a bench trial, the district court issued a lengthy decision finding that Rendall and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first-tier civil penalties of $5,000 against each of them and permanently enjoined them from future violations of § 17(a), § 10(b), and § 13(a). This appeal followed.

In an order issued August 4, 2003, this court addressed legal issues relating to the elements of the SEC's case and to the district court's evidentiary rulings, but reserved ruling on other issues pending a limited remand to the district court for further factual findings. The district court issued very detailed and comprehensive amended findings of fact and conclusions of law on September 24, 2003, which it certified to this court as a supplemental record. The parties then filed supplemental briefs addressing the district court's amended findings and conclusions.

We review the district court's findings of fact for clear error, giving "due regard...to the opportunity of the trial court to judge the credibility of witnesses." Fed. R. Civ. P. 52(a). "[R]eview under the 'clearly erroneous' standard is

significantly deferential." *Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 623 (1993). Accordingly, "[w]e will not disturb the district court's findings of fact unless, following a review of the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002) (quotation omitted). Whether Campbell and/or Rendall made misrepresentations or omissions that were material, and whether they did so with the requisite scienter, are both "fact-specific issues." *Schneider v. Vennard (In re Apple Computer Sec. Litig.)*, 886 F.2d 1109, 1113 (9th Cir. 1989). We review the district court's legal conclusions de novo. *Nieto v. Kapoor*, 268 F.3d 1208, 1217 (10th Cir. 2001). Finally, we review the district court's decision to grant injunctive relief for an abuse of discretion. *See SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993).

In addition to the pertinent law, we have carefully reviewed the district court's amended facts and conclusions, the record before us, and all the parties' briefs. Our review establishes that the district court did not err in finding that Rendall and Campbell made public statements that were materially misleading because they contained material misrepresentations and/or material omissions, and that defendants did so with the requisite scienter. Likewise, the district court did not err in finding that Rendall and Campbell made similarly misleading statements in reports they filed with the SEC. Nor did the district court abuse its discretion in determining, based on all the circumstances, that Rendall and Campbell should be enjoined from future securities violations in addition to being fined for their past violations.

We therefore AFFIRM the judgment of the district court for substantially the reasons set forth in its detailed and comprehensive amended findings of fact and conclusions of

law issued September 24, 2003. Rendall's motion to reconsider our decision not to hear oral argument in this appeal is DENIED. Rendall's motion to require the SEC to file all the trial exhibits of record is DENIED; his amended motion is GRANTED to the extent that it seeks permission to file Exhibit Nos. 20, 25, 885, 886, 887, and 1103 as an additional addendum to his brief.

Entered for the Court

Robert H. Henry
Circuit Judge

EXHIBIT A 4

F I L E D
United States District Court
Albuquerque, New Mexico

May 16, 2000 16:47

s/Robert M. March
Clerk

US District Court
District of New Mexico
Digital File Stamp

Case:	**98cv00860**
Title	**Securities and Exch. v. Solv-Ex Corporation et al.**
Document Type	**Judgment**
Document No.	**127**
Description	**JUDGMENT by Judge Bruce D. Black that Defendants are permanently restrained & enjoined from violation of sections set out; that Rendall and Campbell pay civil penalties of $5,000 each to SEC**

Total Pages	**4**
Exhibits/ Attachment	**0**
Court Signature	**67 27 b6 77 e4 b8 66 63 ef 5a 22 45 f7 3a f6 c5 27 4c 95 48 bd 84 81 44 f3 cb b9 1d b7 dc 1b aa 1e 44 de 6b 0b 25 ba 8d b1 5e a8 33 32 da 48 38 21 78 24 b9 5b b8 34 a2 8f d9 c3 6d 8f 86 51 f3**

This document constitutes an official stamp of the Court and, if attached to the document identified above, serves as an endorsed copy of the pleading. It may be used in lieu of the court's mechanical file stamp for the named document only, and misuse will be treated the same as misuse of the Court's official mechanical file stamp. The Court's digital signature is a verifiable mathematical computation unique to the filed documents and the Court's private encryption key. this signature assures that any change can be detected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. **No. CIV 98-860 BB/RLP**

SOLV-EX CORPORATION, JOHN S. RENDALL, and HERBERT M. CAMPBELL, II,

Defendants.

FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF

THE COURT entered its findings of fact and conclusions of law in this matter, which are incorporated herein by reference, on March 31, 2000. After the parties were unable to agree to a form of judgment, further testimony and evidence was received at a hearing on May 15, 2000. The Court having found that Defendants Solv-Ex Corporation ("Solv-Ex"), John S. Rendall ("Rendall"), and Herbert M. Campbell, II ("Campbell") violated Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)] and Sections 10(b) and 13(a) of the Securities Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(a)], and having concluded that there is a reasonable likelihood that the Defendants will engage in future violations unless enjoined;

Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Solv-Ex, Rendall and Campbell, their officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and they hereby are permanently restrained and enjoined from violating Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 by, directly or indirectly, in the offer or sale of any securities by the use of any means or instruments of interstate commerce:

(1) employing any device, scheme or artifice to defraud; or

(2) obtaining money or property by means of any untrue statement of a material fact or omission to state a material fact.

IT IS FURTHER ORDERED that Solv-Ex, Rendall, and Campbell, their officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and they hereby are permanently restrained and enjoined from violating Section 13(a) of the Exchange Act by, directly or indirectly, filing or causing the filing with the Securities and Exchange Commission of any periodic report on behalf of any issuer, which contains any untrue statement of material, or which omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

IT IS FURTHER ORDERED that Defendant John S. Rendall shall pay a civil penalty of $5,000 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 775(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]

within 30 days of the entry of this Final Judgment. Such payment shall be made to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and a cover letter indicating such payment shall be sent to counsel for the Securities and Exchange Commission, Central Regional Officer, 1801 California Street, Suite 4800, Denver, CO 80202.

IT IS FURTHER ORDERED that Defendant Herbert M. Campbell, II, shall pay a civil penalty of $5,000 pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act within 30 days of the entry of this Final Judgment. Such payment shall be made to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and a cover letter indicating such payment shall be sent to counsel for the Securities and Exchange Commission, Central Regional Officer, 1801 California Street, Suite 4800, Denver, CO 80202.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of enforcing this Final Judgment.

There being no reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

Dated at Albuquerque this 16th day of May, 2000.

By: s/Bruce D. Black
Bruce D. Black
United States District Judge

Counsel for Plaintiff:

Julie K. Lutz, Thomas D. Carter, SEC, Denver, CO
Raymond Hamilton, SAUSA, Albuquerque, New Mexico

Counsel for Defendants:

Richard H. Goldberg, Friedlob Sanderson Raskin Paulson & Tourtillott, Denver, CO
Robert A. Johnson, Karla K. Poe, Eastham Johnson Monnheimer & Jontz, Albuquerque, New Mexico

EXHIBIT A 5

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

No. 00-2339

vs.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL, and HERBERT M. CAMPBELL, II,

Defendants-Appellants.

ORDER

Filed June 16, 2004

Before **HENRY, PORFILIO,** and **MURPHY,** Circuit Judges

Appellant Rendall's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk